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March 13, 2023

Dear Judge Walker,

I write, delightedly, to recommend Lily Fagin to you for a judicial clerkship. She is a genuine star: brilliant, incisive, thoughtful, articulate, and collegial. I can't recommend her highly enough, and I would hire her unhesitatingly for a high-stakes entry-level legal position of virtually any kind. She will be a tremendous asset to any chambers lucky enough to have her on the team.

My name is Daniel Francis. I am an Assistant Professor of Law at NYU Law, where I teach antitrust. (I previously served for three years in the Federal Trade Commission, and practiced antitrust for a decade beforehand.) Lily was one of my students this year. She was a very active participant in class and a frequent visitor to office hours, where we discussed an array of substantive legal issues and research topics. She also put in a terrific performance in the very competitive end-of-course examination. I have therefore had the opportunity to get to know her and her work very well.

Lily is an exceptionally strong student, as her remarkable run of top grades indicates and as my own experience confirms. Her mastery of antitrust was genuinely remarkable. Very simply, she was a stand-out student—one of the strongest three or four—in a very competitive classroom full of gifted folks, many of whom had some previous familiarity with the subject matter. In particular, the race for an “A” grade was *exceptionally* competitive: but Lily navigated complex precedent, microeconomic analysis, and tangled facts with remarkable aplomb and accuracy, both in the exam and throughout the course. Her final grade was an appropriate reward for a semester of terrifically impressive work. It was doubly impressive to have accomplished all this while also obtaining a perfect run of A grades in *all* her classes last semester.

In addition, Lily's classroom participation was, without qualification, the best of any student in our very strong class. Her interventions were accurate and concise, showing great understanding of the substance of antitrust doctrine and a strong grasp of antitrust's frontiers and tensions—including their rich practical and philosophical stakes. Moreover, she interacted confidently, respectfully, and effectively with her peers (including those with very different views) and consistently served as a major driver of classroom discussion, frequently spotting and opening up topics and issues in a manner that invited her colleagues to engage. In sum, she was a model participant in our classroom community: enriching the discussions immeasurably, and engaging gladly and perceptively with even the most fiendish problems and puzzles.

Nor was her great participation confined to whole-class discussion. In addition to traditional lecture, our class involved problem-solving work in small groups. During these exercises I consistently observed Lily taking an active but sensitive role with her peers, encouraging others to share their own views and facilitating a great and productive experience for those around her.

Lily's substantive lawyering skills are excellent. As her superb grades, strong academic profile, law-review editorship, and competitive Teaching / Research Assistant positions all suggest—and as my own experience confirms—she is terrific at distilling complex issues down to their components, framing the key arguments effectively and efficiently, and expressing a bottom-line view that is persuasive and nuanced.

I would gladly trust her to puzzle her way through a complex analytical problem, a messy fact record, or an enigmatic line of authorities. In class, in office hours, and in her final exam, Lily demonstrated a really

Lily Fagin NYU Law '23

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strong grasp of the fabric of antitrust doctrine, and showed remarkable confidence and clarity in navigating the often-tangled highways and byways of an antitrust legal analysis.

Finally, I'd like to say a word in acknowledgment and celebration of Lily's practice of citizenship and her orientation toward service. She is a terrifically dedicated member of our community, investing strongly in clinical service, and continuing a rich and distinguished record of service that began long before she came to law school. From her work supporting migrant rights in Mexico to her service helping support first responders in Native American communities, Lily has been contributing where it counts for many years. I have not the least doubt that she will be a superb example of our professional community, and a glowing example for those who follow her.

I hope it's clear that I endorse Lily's application in the strongest possible terms! I wish you the very good fortune of working with her. Needless to say, please don't hesitate to let me know if I can answer any additional questions, or otherwise assist you as you consider Lily's application. It would be my pleasure to do so. You can reach me by phone on 202-538-1775 or by email at daniel.francis@law.nyu.edu at any time.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Daniel Francis", with a stylized flourish extending from the end of the signature.

Daniel Francis


New York University
A private university in the public service
**Professor Cynthia L. Estlund
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March 23, 2023

RE: Lily Fagin

Dear Jude:

I am writing to strongly recommend Lily Fagin, NYU School of Law class of 2023, for a clerkship in your chambers. Lily is a very talented young lawyer and legal writer and analyst. It took a semester in law school for Lily to hit her academic stride, but since then she has racked up a stellar set of grades in a wide variety of courses, including one of the top grades in my large Property class last fall.

I first got to know Lily in my seminar on Regulating Work Beyond Employment last spring. She was invariably well-prepared and thoughtful in her interventions. Her writing is fluid and clear (which she might owe partly to her two journalist parents!). She showed off her writing skills in several short reaction papers and especially in her final paper, which was one of the very best in the class.

A major theme in the seminar was the clash between antitrust law and collective action among workers classified as independent contractors, and the surprisingly gray outer boundaries of the statutory labor exemption from the Sherman Act. The issue is complicated by the many extant state and federal law tests for the line between “employee” and “independent contractor,” and by the legal chronology: The statutory basis for the “statutory labor exemption” from antitrust law predated the 1935 enactment of the NLRA (which covers “employees”); the Supreme Court decision recognizing the exemption came several years after the NLRA; and then the Taft-Hartley amendments that expressly excluded “independent contractors” from the NLRA came several years after that. The Supreme Court has made only a handful of pronouncements on the application of the labor exemption to independent workers, none of which is very illuminating beyond its particular facts. In her seminar paper, Lily grabbed ahold of a late-breaking First Circuit decision holding that a strike by an association of Puerto Rican jockeys was within the labor exemption whether or not the jockeys were independent contractors. She then applied the court’s analysis to the New York City-based “Los Deliveristas,” an advocacy group for app-based food delivery workers. Recognizing, however, that the court’s analysis (as well as the Supreme Court jurisprudence) was quite underdeveloped, Lily sought to outline a workable and equitable test for the labor exemption that respected the policies underlying both the antitrust laws and

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the labor exemption. It is one of the most thoughtful and interesting things I have read in this space.

Lily is also a delightful person—lively, curious, and engaging. She must have been a fabulous teacher (for two years in Brooklyn before law school). She is sure to be a positive presence in any professional setting, including the judicial chambers. All in all, I am confident that you would find Lily to be an excellent law clerk—reliable, energetic, collegial, and professional.

Sincerely,

A handwritten signature in black ink, appearing to read 'Cynthia Estlund', written in a cursive style.

Cynthia Estlund



DEBORAH N. ARCHER
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March 29, 2023

The Honorable Jamar Walker

Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

RE: Lily Fagin

Dear Judge Walker:

It is my pleasure to recommend Lily Fagin for a judicial clerkship. I am a member of the faculty at NYU School of Law and President of the ACLU. Last year, I had the pleasure of working with Lily in the Civil Rights Clinic I teach. Lily is an excellent legal writer, a thorough researcher, and an enthusiastic team member. I am confident she would be an invaluable addition to your chambers.

The Civil Rights Clinic provides students with the opportunity to work on a wide range of civil rights and social justice matters through direct client representation, appellate advocacy, and the development of advocacy campaigns. Selection is highly competitive, and Lily was one of only eight students selected for the Clinic from a pool of over one hundred applicants. From the first class, Lily was a star. Her work was creative, and she demonstrated compassion and profound empathy for her clients and their needs. She has spent time working with community members to fight discriminatory housing, drafted an amicus brief to the United States Supreme Court, and did cutting-edge research and advocacy on a novel reproductive rights issue.

In all of her work, Lily explored different litigation and policy options, conducting extensive legal research into different potential claims and strategizing with litigation partners and other students to determine the best course of action. This process involved not only diligent attention to detail but also creativity and teamwork. Lily was enthusiastic about conducting research to determine which advocacy options were the most promising. With little initial information, Lily and her colleagues in the clinic developed a sophisticated understanding of the economic and political realities on the ground. I was especially impressed by Lily's diligence in developing mastery of the facts. Months later, when drafting advocacy letters and pleadings, Lily deftly incorporated relevant details with the legal framework.

Lily is a talented legal researcher and writer. In her research, she identifies the most important authorities and can succinctly explain how they fit together by adducing underlying principles. One case she worked on involved bringing a false advertising challenge in a novel factual context. Lily quickly developed expertise in the relevant consumer protection law, identifying the most salient barriers to a finding of liability and brainstorming creative ways to distinguish unfavorable precedents.

Lily also co-lead the drafting of an amicus brief the clinic filed on behalf of the National Black Law Students' Association in *Students for Fair Admissions v. President and Fellows of Harvard College* and *Students for Fair Admissions v. University of North Carolina*. Lily's writing is clear, concise, and always includes appropriate support for her arguments. Because she is also responsible for citations in her role as an Executive Editor of the *Review of Law and Social Change*, she was always happy to bring her attention to detail and blue-booking skills to the clinic's work.

Lily is a great person to work with not only because of the skills detailed above but also because of her friendly and collaborative approach to her work. Lily developed strong professional and personal relationships with the other students in the clinic. She is a lovely person who cares about her peers and coworkers. She was always thoughtful and respectful of other people's time and generous with her own. She has a good attitude and is open to constructive criticism. I believe she would be a great addition to your team. If I can provide any further information, please let me know.

Sincerely,

Deborah N. Archer

Deborah Archer - deborah.archer@nyu.edu - 212-998-6528

TO: [redacted]
 FROM: Lily Fagin, APR Team, NYU Civil Rights Clinic
 DATE: November 29, 2021
 RE: Federal Court Taxpayer Standing

Question Presented: Do taxpayers have standing to challenge federal and/or state government funds being used to support Crisis Pregnancy Centers in federal court?

Short Answer

Probably yes, but with significant limitations. In general, Article III’s “case and controversy” requirement bars individuals whose only injury is by virtue of their status as taxpayers from suing in federal court. *Frothingham v. Mellon* (decided with *Massachusetts v. Mellon*) 262 U.S. 447 (1923); see U.S. Const. art. III § 2, cl. 1. The Supreme Court carved out an exception to this prohibition, however, by granting standing to taxpayers alleging violations of the First Amendment’s religion clauses in *Flast v. Cohen*, 392 U.S. 83 (1968). If Crisis Pregnancy Centers (CPCs) receive government funding and are promoting religious beliefs, aggrieved taxpayers could allege violations of the Establishment Clause. This strategy would only apply to religious CPCs who receive Title X, TANF, or state funds. No one has challenged funding for CPCs as violating the Establishment Clause yet.¹

Long Answer

I. Federal Taxpayer Standing Doctrine

A. General Rule Against Taxpayer Standing

¹ Scholars have discussed the potential for First Amendment violations in the context of judges referring pregnant persons seeking an abortion to consult with CPCs per states’ informed consent statutes. See Helena Silverstein & Kathryn Lundwall Alessi, *Religious Establishment in Hearings to Waive Parental Consent for Abortion*, 7:2 J. OF CONSTITUTIONAL L. 473 (2004).

In *Frothingham*, *supra*, a taxpayer plaintiff alleged that a federal statute, the Maternity Act of 1921 would, in effect, “take her property, under the guise of taxation, without due process of law.” 262 U.S. at 480. The Act appropriated federal money to reduce maternal and infant mortality, but only to those states who chose to participate and accept certain conditions. *See id.* Frothingham was a Massachusetts taxpayer with no personal connection to the issue besides that her tax dollars would be supporting the Act. *See id.* at 486-87. Her challenge was consolidated with that of Massachusetts, which attacked the Act as unduly invasive of its sovereign powers and violative of the Tenth Amendment. *Id.* at 479-80. Until *Frothingham*, the Court had never addressed whether a taxpayer could sue the federal government for an allegedly unconstitutional use of her tax dollars. *See id.* at 486. Earlier decisions had recognized a taxpayer’s right to sue a municipality for the same because, in that scenario, their interest is “direct and immediate” given the smaller number of taxpayers affected. *See id.* at 486-87 (citing *Crampton v. Zabriskie*, 101 US 601 (1879)). But the relationship of United States taxpayer to the federal government is “very different”:

His interest in the moneys of the treasury—partly realized from taxation and partly from other sources—is shared with millions of others, is comparatively minute and indeterminable, and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.

Id. at 487. Given the vast number of taxpayers affected by a federal statute and the indeterminacy of their implicated interests, the Court held that “[t]he administration of any statute....is essentially a matter of public and not individual concern.” *Id.* The Court cautioned that a

contrary holding would lead to down slippery slope whereby any individual taxpayer could attack any action of the federal government. *Id.*

The *Frothingham* Court largely based its holding on separation of powers concerns. *See id.* 487-89. Sustaining a taxpayer suit would invade the province of Congress because it would allow the Court to adjudge the constitutionality of a statute in the absence of a “direct injury suffered or threatened.” *Id.* at 488. When a particular injury is alleged, the Court says what the law is to determine how the law applies to the controversy before it. *Id.* This limitation prevents the Court from undermining Congress’s power to make laws. *See id.* Hence a party seeking to invoke the power of the courts “must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.” *Id.* The Court held that Frothingham had made no such showing, so she lacked standing to sue. *Id.* Allowing her case to proceed to the merits “would be, not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and coequal department, an authority which plainly we do not possess.” *Id.* at 489.

Crucially, the court noted that a resident could sue to enjoin a *local* government’s illegal use of tax dollars because “[t]he interest of a taxpayer of a municipality in the application of its moneys is direct and immediate,” analogous to that of a shareholder’s interest in a private corporation. Even so, the court rejected a First Amendment challenge by New Jersey taxpayers to a state law which authorized public school teachers to read from the Bible because that statute did not clearly involve the expenditure of funds. *Doremus v. Board of Ed. of Hawthorne*, 342 U.S. 429, 433-35 (1952). After *Frothingham*, then, federal taxpayer suits were barred, and state or local taxpayer suits were limited to those challenging expenditures of funds.

B. The *Flast* Exception

In *Flast*, *supra*, seven federal taxpayers sued to prevent federal funds from being used to finance instruction at and purchase textbooks for religious schools, alleging that such use of funds violated the First Amendment. 392 U.S. at 85-87. Titles I and II of the Elementary and Secondary Education Act of 1965 required local governments applying for federal funding to submit proposals where special educational opportunities and instructional materials would be “provided on an equitable basis for the use of children and teachers in private elementary and secondary schools,” including private religious schools. *See id.* at 87. Because funds would only be disbursed to localities that adhered to the statutory requirement to fund private religious schools as well, the *Flast* plaintiffs argued, the challenged provisions of the Act “constitute a law respecting an establishment of religion” and “prohibit the free exercise of religion.” *Id.* at 87. Because the plaintiffs’ only alleged injury was that their tax dollars were being used in contravention of the First Amendment, *Flast* required the Court to revisit the issue of whether taxpayers had standing to challenge actions of the federal government. *See id.* at 85, 89. A divided three-judge panel held that *Frothingham* barred the taxpayers’ suit. *Id.* at 88.

The Court reversed, holding that the *Flast* plaintiffs did have standing. *See id.* at 88. Writing for the majority, Chief Justice Warren rejected the government’s argument that, per *Frothingham*, the requirements of Article III represent an “absolute bar” to taxpayer suits. *See id.* at 92-94, 100-01. The Court characterized *Frothingham*’s holding (and justiciability doctrine more broadly) as resting on both prudential and Constitutional considerations. *See id.* at 92-101. The Court then argued that constitutional separation of powers issues do not arise by virtue of the threshold inquiry into whether someone is a proper party to sue, but rather depending on the substance of that person’s claim. *Id.* at 100-101. Thus, “the question of standing is related only to

whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.” *Id.* at 101. This depends on the interest of the party invoking federal court jurisdiction in the outcome of the case. *Id.*

The Court then articulated a test to determine when individuals have “the necessary stake as taxpayers in the outcome of the litigation to satisfy Article III requirements.” *Id.* at 102. The test has two prongs. *Id.* “First, the taxpayer must establish a logical link between that status [as a taxpayer] and the type of legislative enactment attacked.” *Id.* (emphasis added). Only a challenge to an exercise of Congress’ power under the Taxing and Spending Clause, as opposed to an “incidental expenditure of tax funds in the administration of an essentially regulatory statute,” can confer standing. *Id.*; see U.S. Const. art. I § 8. “Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged.” *Flast*, 392 U.S. at 102 (emphasis added). In other words, the taxpayer must argue that the challenged government action “exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress.” *Id.* at 102-03.

The Court held that the *Flast* plaintiffs’ challenge satisfied both nexuses. *Id.* at 103. Plaintiffs sought to enjoin expenditure of federal tax dollars pursuant to of Congress’s Article I § 8 power to tax and spend for the “general welfare,” satisfying the first nexus. *Id.*; see U.S. Const. art. I § 8. And plaintiffs were able to point to the religion clauses of the First Amendment as specific constitutional limitations on the exercise of the taxing and spending power. *Id.*; see U.S. Const. amend. I. Citing the contemporaneous writings of James Madison, “generally recognized as the leading architect of the religion clauses of the First Amendment,” the Court argued that the

founders intended for the First Amendment's Establishment and Free Exercise clauses to serve as a limitation on the government's taxing and spending powers. *See Flast*, 392 U.S. at 103-04.²

The Court left open the possibility that other specific constitutional limitations on the exercise of the taxing and spending power besides the Establishment Clause exist. *Id.* at 105. “[W]henver such specific limitations are found, we believe a taxpayer will have a clear stake as a taxpayer in assuring that they are not breached by Congress.” *Id.* at 106. Thus, *Flast's* holding was not limited to Establishment Clause-based challenges:

[A] taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power. The taxpayer's allegation in such cases would be that his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power.

Id. at 105-06. Such a case would be sufficiently specific and adversarial to warrant judicial resolution. *See id.* at 106.

C. SCOTUS Treatment of More Recent Taxpayer Challenges

After *Flast*, the Court granted standing to plaintiffs bringing Establishment Clause-based challenges to statutes under which federal dollars were supporting organizations that engaged in religious activity. In *Tilton v. Richardson*, for example, the Court granted taxpayers standing to object to the provision of federal construction grants for private colleges and universities under the Higher Education Facilities Act of 1963. 403 U.S. 672 (1971). While the Act specified that

² In *Frothingham*, by contrast, the plaintiff had not satisfied the second nexus. *See Flast*, 392 U.S. at 105. Frothingham had alleged that the Maternity Act violated her due process rights, but the Fifth Amendment Due Process Clause does not necessarily protect taxpayers from increased liability. *Id.* Frothingham had also attacked the Maternity Act as exceeding Congress's taxing and spending power and violating the Tenth Amendment by invading the province of the states. *See id.* But in doing so, she was actually “attempting to assert the States' [specifically Massachusetts's] interest in their legislative prerogatives and not a federal taxpayer's interest in being free of taxing and spending in contravention of specific constitutional limitations imposed upon Congress' taxing and spending power.” *Id.* By holding that Frothingham would have failed the second prong of the *Flast* test for taxpayer standing, the Court was able to reconcile its decision in *Flast* with the precedent established by *Frothingham*. *See id.*

grant money should not go to “any facility used or to be used for sectarian instruction or as a place for religious worship, or * * * primarily in connection with any part of the program of a school or department of divinity,” the government’s interest in ensuring the institutions’ secular character would only last 20 years. *Id.* at 672. Because the government had not demanded adequate assurance that these colleges would pay back their grant money if they began using the facilities for religious purposes, plaintiffs had demonstrated a constitutional violation. *See id.* at 683. While the *Tilton* Court never explicitly addressed the question of whether the taxpayers had standing, it ruled on the merits of their challenge, suggesting their suit fell within the *Flast* exception. *See id.*; *see also Tilton v. Richardson*, 399 U.S. 904 (1970) (noting probable jurisdiction).

A decade later, the Court rejected a taxpayer challenge to the Federal government’s conveyance of a former army hospital to a Christian college free of cost. *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). Writing for the majority, Rehnquist argued that *Flast* was not satisfied because plaintiffs were challenging a decision by an administrative agency pursuant to the Federal Property and Administrative Services Act of 1949, an exercise of Congress’s Property Clause power rather than its Taxing and Spending Clause power. *See id.* at 479-80. Rehnquist held that the plaintiffs had failed “to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees.” *Id.* at 485. Yet the taxpayer plaintiffs in *Tilton* had not claimed a more particularized injury either. *See id.* at 512 (Brennan, J., dissenting).

Taken together, *Tilton* and *Valley Forge* suggest that the *Flast* exception only enables taxpayers to challenge government action pursuant to Congress’s exercise of its taxing and

spending power. *Compare Tilton*, 403 U.S. 672 (granting standing to taxpayers challenging a government program of funding construction by private colleges, including religious ones) *with Valley Forge Christian Coll.*, 454 U.S. at 482 (denying standing to taxpayers challenging the government’s decision to convey surplus property to a religious college free of cost). While the government action in both cases benefitted religious institutions, the plaintiffs in *Valley Forge* could not draw a close enough connection between their tax dollars and the government’s action to satisfy the first nexus of *Flast*. *Valley Forge Christian Coll.*, 454 U.S. at 479-80.

Bowen v. Kendrick reaffirmed that, where plaintiffs challenged an exercise of the Taxing and Spending power as violating the Establishment Clause, they could be granted standing under *Flast*. 487 U.S. 589 (1988). Even though the plaintiffs were unsuccessful in convincing the court that the Adolescent Family Life Act (AFLA) violated the Establishment Clause on its face, the Court held that their status as taxpayers was sufficient to confer standing. *Id.* at 591, 618-19. The Court rejected the government’s contention that because the Secretary of Health and Human Services was involved in administering the AFLA, it was not really an exercise of Congress’s taxing and spending powers. *Id.* at 619-20. Rather, because “the AFLA is at heart a program of disbursement of funds pursuant to Congress’ taxing and spending powers, and appellees’ claims call into question how the funds authorized by Congress are being disbursed pursuant to the AFLA’s statutory mandate,” there was “a sufficient nexus between the taxpayer’s standing as a taxpayer and the congressional exercise of taxing and spending power.” *Id.* The Court remanded the case to the District Court to assess the merits of plaintiff’s as applied challenge. *Id.* at 620.

In more recent Establishment Clause taxpayer suits, the Court has held that plaintiffs lack standing—again because they were not challenging exercises of Congress’s taxing and spending power. *See, e.g. Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587 (2007), *Arizona*

Christian School Tuition Org. v. Winn, 563 US 125, (2011)³. See also *Laskowski v Spellings*, 546 F3d 822 (7th Cir. 2008) (observing that after *Hein*, “the reach of *Flast* is now strictly confined to the result in *Flast*. And the result in *Flast* was that the taxpayers had standing to seek an injunction to halt a specific congressional appropriation alleged to violate the Establishment Clause.”) While recent decisions have been unfavorable to plaintiffs suing on an aggrieved taxpayer theory, the core holdings of *Flast* remain intact. Where plaintiffs can connect their status as taxpayers to an exercise of Congress’s taxing and spending power and a specific constitutional harm (in practice, only a violation of the First Amendment’s Establishment Clause), they have standing to sue in an Article III court. See *Flast*, 392 U.S. at 102.

II. Alleging that government funding for CPCs violates the Establishment Clause

A. Federal Taxpayer Standing: Title X Funding for CPCs

Some CPCs in California, New Mexico, and Washington receive federal funding via Title X.⁴ See 42 U.S.C. § 300 et seq. (project grants and contracts for family planning services). If

³ In *Hein v. Freedom From Religion Foundation, Inc.*, the Court denied standing to taxpayers claiming that conferences held by President Bush as part of his Faith-Based and Community Initiatives program violated the Establishment Clause. 551 U.S. at 592-93. Alito, writing for the majority, argued that because spending on these conferences “resulted from executive discretion, not congressional action,” the taxpayer plaintiffs were not within the *Flast* exception. *Id.* at 605. While tax dollars were supporting the Executive Branch program, plaintiffs had not directed their challenge against a particular statute. *Id.* at 607. In dissent, Souter rejected this distinction between legislative and executive actions because the injury to taxpayers—state endorsement of religion in violation of the First Amendment—was the same. *Id.* at 637 (Souter, J., dissenting). If plaintiffs had identified and challenged the specific statute under which funds were appropriated for this Executive Branch program rather than the program itself, the Court seemingly would have granted them standing. See *id.* at 607. In *Arizona Christian School Tuition Org. v. Winn*, the Court applied the same formalistic logic to deny standing to Arizona taxpayers challenging their state’s provision of tax credits for contributions to charitable organizations that provide scholarships to students attending private schools, many of which are religious. 563 US at 129, 137-38. Writing for the majority, Kennedy held that plaintiffs had failed to allege an injury sufficient to confer standing; there was insufficient evidence that Arizona taxpayers suffered economic harm. *Id.* at 137-38. Because the funding supporting students’ tuition at private religious schools was not directly drawn from tax revenue and the plaintiffs did not demonstrate that Arizona’s policy of providing credits increased their tax burden, this challenge failed the first prong of *Flast*. *Id.* at 137-38, 144.

⁴ THE ALLIANCE: STATE ADVOCATES FOR WOMEN’S RIGHTS AND GENDER EQUALITY, STUDY OF CRISIS PREGNANCY CENTERS (CPCs) IN NINE STATES: ALASKA, CALIFORNIA, IDAHO, MINNESOTA, MONTANA, NEW MEXICO, OREGON, PENNSYLVANIA, WASHINGTON (2021) (hereinafter “Alliance Report”)

CPCs are infusing religion into their operations, taxpayers could have standing to challenge CPCs' receipt of Title X funds. Because most CPCs are grounded in religious ideology, there is a strong possibility that their programs use federal funding to promote that ideology.⁵

As a program of grants, Title X is an exercise of Congress's taxing and spending power analogous to the statutes at issue in *Tilton* or *Bowen*. 42 U.S.C. § 300 et seq.; see *Tilton*, 403 U.S. 672; *Bowen*, 487 U.S. 589; see also U.S. Const. art. I § 8. Thus, the first prong of *Flast*, a connection between the plaintiff's status as a taxpayer and the type of "legislative enactment attacked," is satisfied. See *Flast*, 392 U.S. at 102. The second prong of *Flast* is likely also satisfied because Supreme Court precedent firmly establishes the First Amendment's religion clauses as "specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power." *Id.* at 102-03; see, e.g., *Tilton*, 403 U.S. 672; *Bowen*, 487 U.S. 589.

Whether an aggrieved taxpayer suit could in fact enjoin CPCs from receiving Title X funding depends on the merits of the claimed Establishment Clause violation. To assess whether a statute violates the Establishment Clause, courts ask whether: (1) the statute has "a secular legislative purpose," (2) "[the statute's] principal or primary effect...neither advances nor inhibits religion..." and (3) "the statute foster[s] an excessive government entanglement with religion." *Lemon v Kurtzman*, 403 U.S. 602, 612-13 (1971) (internal citations omitted). Because Title X is primarily a program of family planning grants for low-income families, it would easily satisfy *Lemon*'s first two criteria. See *id.*; see also 42 U.S.C. § 300 et seq. Whether disbursing Title X funding to CPCs fosters "an excessive government entanglement with religion" would be

⁵ For example, Obria, a CPC network affiliated with Catholic beliefs, receives Title X funding. CAMPAIGN FOR ACCOUNTABILITY, TROLLING FOR TITLE X FUNDS: HOW BUSINESSWOMAN KATHLEEN EATON BRAVO DIVERTED FEDERAL FUNDS DESIGNATED FOR FAMILY PLANNING SERVICES TO HER EMPIRE OF DELIBERATELY MISLEADING CLINICS (2019), <https://campaignforaccountability.org/wp-content/uploads/2019/05/CfA-Report-Obria-History-5-13-19.pdf>.

a fact-intensive inquiry depending on how much CPCs are engaging in religious activity. *See Lemon*, 403 U.S. at 613.

B. State Taxpayer Standing: State Funding for CPCs

State taxpayers can also challenge unconstitutional state spending. *Doremus*, *supra*, held that state taxpayer plaintiffs only had standing to bring a “good-faith pocketbook action,” meaning plaintiffs were required to trace the specific economic harm they suffered because of a state’s allegedly unconstitutional act. *See* 342 U.S. at 434 (citing *Frothingham*, 262 U.S. at 488); *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 345 (2006) (“The...rationale for rejecting federal taxpayer standing applies with undiminished force to state taxpayers.”). It is, however, unclear whether the *Flast* exception applies any differently to *state* taxpayer challenges compared to *federal* ones, largely because most recent caselaw reverses grants of standing to taxpayer plaintiffs. *See, e.g., Arizona Christian School Tuition Org., supra, Ansley v. Warren*, 861 F.3d. 512 (4th Cir. 2017) (reversing the District Court’s holding that North Carolina taxpayers had standing to challenging a state statute allowing public officials to recuse themselves from performing same-sex marriages), *Barber v. Bryant*, 860 F3d 345 (5th Cir. 2017) (reversing the District Court’s holding that Mississippi taxpayers had standing to challenge a state statute barring discrimination against people who act in accordance with anti-LGBTQ religious beliefs). The Supreme Court distinguished *DaimlerChrysler Corp* from *Flast*, however, because *DaimlerChrysler* did not allege an Establishment Clause violation. *See id.* at 349. In *Arizona Christian School Tuition Org*, the problem was not that the taxpayers challenged state rather than federal action, but instead that the nexus requirements of *Flast* were not met (in other words, that the plaintiffs could not connect their status as taxpayers to the state’s action). *See* 563 U.S. at 138-145 (citing taxpayer cases challenging federal spending as precedent and denying

standing because the first nexus required by *Flast* was not met). Thus, while it is an open question whether the *Flast* analysis changes for state as opposed to federal taxpayer challenges, there is no reason to think that attacking state spending presents an additional barrier.⁶

Several states provide funding for CPCs, including Pennsylvania and Minnesota.⁷ Taxpayers in those states could similarly allege Establishment Clause violations sufficient to confer Article III standing. *See supra* Part II-A. The Establishment Clause is binding on the states through the Fourteenth Amendment. *Everson v Bd. of Ed. of Ewing Twp.*, 330 US 1, 8 (1947); *Murdock v. Pennsylvania*, 319 US 105, 108 (1943). Again, the success of Establishment Clause-based claims on the merits would depend on plaintiffs’ ability to demonstrate that CPC activity promotes an “excessive government entanglement with religion.” *Lemon*, 403 U.S. at 613.

1. Pennsylvania

Pennsylvania contracts with Real Alternatives, a CPC network, to administer its Pregnancy and Parenting Support Services (formerly Alternatives to Abortion) program.⁸ Pennsylvania’s Department of Human Services (DHS) funds Real Alternatives through a combination of federal Temporary Assistance for Needy Families (TANF) monies and State

⁶ In a decision about the merits of an Establishment Clause challenge, the Supreme Court affirmed lower courts’ determination that state taxpayer plaintiffs had standing. *School Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373, 380 n. 5 (1985). *See also Pedreira v Kentucky Baptist Homes for Children, Inc.*, 579 F.3d 722, 733 (6th Cir. 2009) (granting standing to state taxpayer plaintiffs challenging a state-funded religious foster care organization’s practice of denying employment to LGBTQ individuals as violating the Establishment Clause). *But see Barber v. Bryant*, 860 F.3d 345 (5th Cir. 2017) (denying standing to state taxpayers invoking *Flast* exception); *Ansley v. Warren*, 861 F.3d 512 (4th Cir. 2017) (same).

⁷ Alliance Report, *supra* note 4.

⁸ Letter from Division of Procurement, Pennsylvania Department of Health, to Real Alternatives (June 24, 2019), <https://www.documentcloud.org/documents/6939360-RA-PA-19-20-Extension-Searchable.html> (obtained by Campaign for Accountability and published via Document Cloud).

General Fund monies according to a grant agreement.⁹ Funds are currently appropriated for Real Alternatives as part of Pennsylvania's annual budget. *See* 72 PA. STAT. ANN. § 1729-B(5).

Based on a search of Lexis, West, and Google, there is no specific state statute establishing nor implementing the Pregnancy and Parenting Support Services/Alternatives to Abortion program. Instead, the program is part of Pennsylvania's State Plan for its TANF block grant.¹⁰ The renewal of the program each year thus appears to be a matter committed to the Pennsylvania DHS's discretion. *Cf. Hein*, 551 U.S. at 605 (use of taxpayer dollars for President Bush's Faith-Based and Community Initiatives program was a matter of executive discretion). Given *Valley Forge* and *Hein*'s emphasis on attacking a specific legislative enactment as a prerequisite for claiming taxpayer standing under the *Flast* exception, it could be difficult to challenge Pennsylvania's funding of Real Alternatives on an aggrieved taxpayer theory in Federal Court. *See Valley Forge*, 454 U.S. at 479; *Hein*, 551 U.S. at 605. It is possible to argue that the distinction between executive and legislative actors in the implementation of an unconstitutional law is artificial, given that executive branch actors ultimately derive their discretionary authority from an authorizing statute. *See Hein*, 551 U.S. at 637 (Souter, J., dissenting). Considering that the trend in Supreme Court doctrine has been towards narrowing *Flast*, this argument is unlikely to succeed. *See Arizona Christian School Tuition Org*, 861 F.3d. 512.

2. Minnesota

Minnesota sponsors a Positive Alternatives program like Pennsylvania's, providing grants to nonprofits "promoting healthy pregnancy outcomes [i.e., not abortion] and assisting

⁹ *Id.*

¹⁰ PA. DEP'T OF HUM. SERVS., 2021 TANF STATE PLAN 35-36 (effective October 2021), https://www.dhs.pa.gov/Services/Assistance/Documents/TANF%20State%20Plan%20effective%20date%20October%201_%202021%20Clean%20080421.pdf.

pregnant and parenting women in developing and maintaining family stability and self-sufficiency.”¹¹ Grantee organizations include several CPCs, with a total of \$2,808,891 going to CPCs in 2021.¹² Some grantee organizations are explicitly religious: Catholic Charities of the Diocese Winona-Rochester, for example, receives \$248,541 annually under the Positive Alternatives program.¹³ While none of the other grantees have explicitly religious names, many are likely also motivated by religious ideology or affiliated with religious groups.¹⁴

Unlike Pennsylvania’s program, Minnesota’s Positive Alternatives program is specifically authorized by statute. MINN. STAT. § 145.4235 (2021). The statutory criteria for grant recipients make no mention of a need to refrain from religious activity. *See id.* §§ 2(c). The Commissioner of Minnesota’s Department of Health is responsible for overseeing the program and can cease funding to grantees that fall out of compliance with the statute. *See id.* §§. 4. Even though the Commissioner has discretion in administering the statute, her authority is grounded in a legislative mandate. *See id.* Thus, an aggrieved taxpayer challenge to Minnesota’s statute would be analogous to *Bowen v. Kendrick*, where the Court granted taxpayer standing and rejected the government’s argument that an Executive Branch member’s role in administering a statute brought the case outside the ambit of *Flast*. *See* 487 U.S. at 619-20. The statute establishing Minnesota’s Positive Alternatives program is primarily concerned with appropriating funds. *See* MINN. STAT. § 145.4235 (2021). Hence the statute is best understood as

¹¹ *Positive Alternatives Overview*, MINN. DEP’T OF HEALTH, (October 10, 2022), <https://www.health.state.mn.us/people/womeninfants/positivealt/overview.html>.

¹² San Stroozas, *Every Fake Abortion Clinic in Minnesota, Mapped*, RACKET (August 26, 2021), <https://racketmn.com/every-fake-abortion-clinic-in-minnesota-mapped/> (referring to CPCs as “fake clinics”).

¹³ MINN. DEP’T OF HEALTH, 2021 - 2025 POSITIVE ALTERNATIVES GRANT AWARDS WITH PROGRAMS OR SERVICES, (2021), <https://www.health.state.mn.us/docs/people/womeninfants/positivealt/paagantees202125.pdf>.

¹⁴ *See* Nancy Gibbs, *The Grassroots Abortion War*, TIME (Feb. 15, 2007), <https://web.archive.org/web/20070218124958/http://www.time.com/time/printout/0,8816,1590444,00.html>.

an exercise of the state's taxing and spending power, satisfying the first nexus from *Flast*. See *Flast*, 392 U.S. at 102.

The second nexus requires the taxpayer to connect their status as a taxpayer to “the precise nature of the constitutional infringement alleged.” *Id.* The Court's jurisprudence since *Flast* firmly establishes that the First Amendment's religion clauses serve as a limitation on government taxing and spending powers, and violation of them is a constitutional injury sufficient to confer standing on any affected taxpayer. See *Flast*, 392 U.S. at 102; see also *supra*, Section I-C-1. If Minnesota's Positive Alternatives funding is being used to support CPCs who also engage in religious activity, a taxpayer could have standing to challenge MINN. STAT. § 145.4235 (2021). The taxpayer's injury is arguably even more particularized than in *Flast* because the pool of taxpayers in Minnesota is considerably smaller than the pool of all federal taxpayers. See *Frothingham*, 262 U.S. at 487; *Flast* 392 U.S. at 106.

There is a jurisdictional problem with attempting to challenge this law in Federal Court, however: the statute states that the Minnesota Supreme Court has original jurisdiction over an action challenging its constitutionality. MINN. STAT. § 145.4235 Subd. 6 (2021).

III. Consequences of invoking the *Flast* exception before the current Supreme Court

Regardless of the legal precedent supporting an Establishment Clause-based taxpayer challenge to funding for CPCs, the likelihood of success before the current Supreme Court is extremely low. In *Hein*, Justice Scalia, joined by Justice Thomas, advocated for overruling *Flast* and eliminating its exception to the rule against taxpayer standing altogether. See *Hein*, 551 U.S. at 618 (Scalia, J., dissenting). Scalia characterized the harm suffered by the plaintiffs in *Flast* and its progeny as a “psychic injury” rather than a “wallet injury.” See *id.* 619-30. Scalia and Thomas again advocated for overturning *Flast* in a concurring opinion in *Arizona Christian School*

Tuition Org., 563 U.S. at 147 (Scalia, J., concurring).¹⁵ The fact that Scalia wrote separately suggests that Kennedy’s controlling opinion in *Arizona Christian School Tuition Org.* leaves the core holdings of *Flast* intact.¹⁶ But given changes in the composition of the Supreme Court since 2011, it is possible that the Court would dispose of an aggrieved taxpayer suit by overruling *Flast*. But it may be equally likely the Court would continue the trend of *Hein* and *Arizona Christian School Tuition Org.* by finding some way to distinguish *Flast*, narrowing its holding further without overruling it outright. *See supra* § I-C-1.

IV. Conclusion

While there is a solid legal argument that federal or Minnesota taxpayer plaintiffs could challenge government funding for CPCs as violating the Establishment Clause, this strategy would require intensive fact investigation into CPCs’ everyday practices and would only affect a small proportion of all CPCs nationwide. Especially given the Supreme Court’s growing hostility to taxpayer standing, it is probably not worth pursuing an aggrieved taxpayer strategy in federal court at this time.

¹⁵ Even the majority opinion in *Arizona Christian School Tuition Org.* significantly narrowed the *Flast* exception, distinguishing the Arizona program from *Flast* because the state was providing tax credits as a subsidy rather than taxing directly. 563 U.S. at 142. In dissent, Kagan complained that the majority opinion “enables the government to end-run *Flast*’s guarantee of access to the Judiciary. From now on, the government need follow just one simple rule—subsidize through the tax system—to preclude taxpayer challenges to state funding of religion.” *Id.* at 148 (Kagan, J., dissenting).

¹⁶ *See* Lyle Denniston, *Opinion Recap: The Near-end of “Taxpayer Standing,”* SCOTUSBLOG (Apr. 4, 2011, 11:26 AM), <https://www.scotusblog.com/2011/04/opinion-recap-the-near-end-of-taxpayer-standing/>.

Applicant Details

First Name	Laura
Last Name	Fisher
Citizenship Status	U. S. Citizen
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Contact Phone Number	9196089456

Applicant Education

BA/BS From	University of North Carolina-Chapel Hill
Date of BA/BS	May 2015
JD/LLB From	University of North Carolina School of Law
	https://law.unc.edu/
Date of JD/LLB	May 13, 2024
Class Rank	15%
Law Review/Journal	Yes
Journal(s)	North Carolina Law Review
Moot Court Experience	No

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	No
--------------------------------------	----

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

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ramckinn@email.unc.edu
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Chew, Alexa
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919.843.6682

Bills, Jennifer
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

LAURA FISHER

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(919) 608 9456 | lfisher@unc.edu

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am a rising third-year law student at the University of North Carolina, and I am writing to apply for a clerkship in your chambers for the 2024-2025 term. My resume, writing sample, law school transcript, and letters of recommendation are submitted with this application.

Please do not hesitate to contact me at the above phone number or email address if you need any additional information. Thank you for your consideration. I look forward to hearing from you.

Sincerely,



LAURA FISHER

820 W Knox Street, Durham, NC 27701
(919) 608 9456 | lfisher@unc.edu

EDUCATION

University of North Carolina School of Law, Chapel Hill, North Carolina

Juris Doctor, expected May 2024

Cumulative GPA: 3.761, top 15% (GPA cutoff for top 10% is 3.776)

Activities:

- *North Carolina Law Review*, Comments Editor; Forthcoming Publication: *With More Power Comes More Responsibility: The North Carolina Supreme Court Acknowledges Nurse Autonomy, but Clearer Guidelines Surrounding Liability are Needed*
- Honors Writing Scholar (research and writing mentor for first-year students)
- Certificate of Merit (highest class grade), Research, Reasoning, Writing, and Advocacy, Fall 2021 and Spring 2022
- 75 hours of pro bono participation: multi-state statutory research of disability benefits, multi-state statutory research of mental illness definition, assessment of prison conditions across the country

University of North Carolina at Chapel Hill, Chapel Hill, North Carolina

Bachelor of Arts, Journalism and Mass Communications, May 2015

Bachelor of Science, Information and Library Science, May 2015

Cumulative GPA: 3.762, Dean's List

EXPERIENCE

The Honorable James Andrew Wynn, Raleigh, North Carolina

Judicial Extern, Fall 2023

Patterson Harkavy LLP, civil rights and employment law firm, Chapel Hill, North Carolina

Summer Associate, Summer 2023

Disability Rights North Carolina, Raleigh, North Carolina

Legal Intern, June 2022 – August 2022

Drafted demand letters, research memos, and a complaint; researched legal issues including tenant rights, service animal rights, and worker rights; examined public records to find evidence for litigation team; presented research findings in co-counsel litigation meetings; developed written public resources about the rights of people with disabilities; conducted intake calls with clients and provided them with legal resources; attended hearings; monitored treatment facilities for rights violations.

Big Duck, communications firm for nonprofits, Brooklyn, New York

Senior Strategist, June 2019 – July 2021

Strategist, September 2016 – May 2019

Junior Strategist, August 2015 – August 2016

Developed communications recommendations for clients; conducted research including surveys, interviews, and focus groups; synthesized research to inform recommendations; wrote communications plans and research briefs; collaborated with writers to create messaging documents; supported diversity, equity, and inclusion efforts by facilitating meetings and contributing to planning conversations.

INTERESTS

Disability and health justice, nonprofits, running, cats



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Unofficial Law School Transcript

Note to Employers from the Career Development Office: Grades at the UNC School of Law are awarded in the form of letters (A, A-, B+, B-, C, etc.). Each letter grade is associated with a number (A = 4.0, A- = 3.7, B+ = 3.3, B = 3.0, etc.) for purposes of calculating a cumulative GPA. An A+ may be awarded in exceptional situations. For more information on the grading system, including the current class rank cutoffs, please contact the Career Development Office at (919) 962-8102 or visit our website at <https://law.unc.edu/careers/for-employers/grading-policy-faq/>

Student Name: Laura Fisher

Cumulative GPA: 3.761

Course	Description	Term	Grade	Units
LAW 204	CONTRACTS	2021 Fall	B+	4.00
LAW 209	TORTS	2021 Fall	A-	4.00
LAW 295	RES, REAS, WRIT, ADVOC I	2021 Fall	A	3.00
LAW 201	CIVIL PROCEDURE	2021 Fall	B+	4.00
LAW 205	CRIMINAL LAW	2022 Spring	A-	4.00
LAW 296	RES, REAS, WRIT, ADVOC II	2022 Spring	A	3.00
LAW 207	PROPERTY	2022 Spring	A-	4.00
LAW 234A	CONSTITUTIONAL LAW	2022 Spring	A	4.00
LAW 242	EVIDENCE	2022 Fall	A+	4.00
LAW 266F	PROF RESPONSIBILITY	2022 Fall	A-	3.00

LAW 343	DISABILITY LAW	2022 Fall	A+	3.00
LAW 220	ADMINISTRATIVE LAW	2022 Fall	A	3.00
LAW 244	FAMILY LAW	2023 Spring	B+	3.00
LAW 206	CRIM PRO INVESTIGATION	2023 Spring	B+	3.00
LAW 444	PSYCHIATRY AND LAW	2023 Spring	A	3.00
LAW 228	BUSI ASSOCIATIONS	2023 Spring	A-	4.00

GPA Calculation	
Total Grade Points	210.600
/ Units Taken Toward GPA	56.000
= GPA	3.761

April 3, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It is a joy to have this opportunity to recommend Laura Fisher for your most serious consideration for a clerkship in your chambers upon her graduation from the University of North Carolina School of Law in the Spring of 2024.

Throughout my twenty-year career as Director of UNC Law's legal research and writing program, I had the opportunity to work closely with hundreds of students as they developed their skills as lawyers. Over those years, I rarely worked with a student whose organizational skills, eye for detail, ability to write clearly and accurately, and ability to work well with others were as well-developed as Laura's.

I met Laura in the 2021-22 school year when, as a 1L, she volunteered to work with me and a cadre of fellow 1Ls on a major pro bono project involving state employees' disability rights in North Carolina. The students' assignment was to survey how surrounding states addressed the need to recoup inadvertent overpayments of state funds. We held weekly meetings attended by one of UNC Law's assistant library directors to compare what students were finding. By Week #2, Laura had developed not only a systematic approach to her research, but also a sophisticated method for recording her findings. The entire team found her approach so useful that we adopted it, on the spot, as the model for the team to follow.

Before coming to law school, Laura had pursued double undergraduate majors – one in Journalism and one in Library Science – and earned an impressive 3.762 undergraduate GPA. I have thought that this background is what has contributed not only to her interest in thorough legal research and careful, clear writing, but also what has allowed her to make the transition to legal research and writing so smoothly.

Laura is now in the top 10% of her class and is a member of the *North Carolina Law Review*, which has opted to publish her recently submitted article. These academic achievements are remarkable, but I am perhaps even more impressed by Laura's ability to achieve these goals while keeping her life balanced and her warm personality intact.

In summary, I recommend Laura Fisher to you for your most serious consideration. She is multi-talented, highly intelligent, personable, curious to learn, and a born team player. I hope this perspective is helpful and remain available for any questions that you may have about Laura and her potential.

Sincerely,

Ruth Ann McKinney
Clinical Professor of Law Emerita
Cell: 919.215.5299
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Ruth McKinney - ramckinn@email.unc.edu - (919) 962-5384

June 09, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am pleased to offer my strong support of Laura Fisher's application for a clerkship in your chambers. Laura was in my Research, Reasoning, Writing, and Advocacy II class during the spring of 2022, where she earned a final course grade of "A," as well as the High Merit Certificate for Outstanding Performance, which goes to the person in each section with the strongest performance. The course was three credits, and students submitted six substantial writing assignments for me to review. I also met with all students at least five times to discuss their research and writing. As a result, I have a good sense of Laura as a student and as a person.

Laura is a talented writer with very strong legal research and skills. She is also friendly, easy to work with, and cool under pressure.

In my course, Laura wrote an office memo, two motion memos and an appellate brief. The office memo, first motion memo, and appellate brief were ungraded, giving students an opportunity to practice their legal research and writing skills. But the final motion memo was worth 65% of their grades, and students completed it on their own. They received a packet of law on an unfamiliar federal topic, plus filings from a fictional case in district court, and then they wrote a memorandum in support of a motion. In Laura's class, the assignment was a trade dress case and a motion for summary judgment by an alleged infringer. Students received no individual guidance from me; all I did was answer general questions in class or in a document shared with the entire class.

Laura's final motion memo was a pleasure to read from start to finish. In particular, she wrote excellent illustrations—descriptions of cases that applied the key trade dress infringement rules and that she could then use to compare and contrast with her client's facts. She fit the illustrations together to show how the rules worked in practice, including important contextual details when describing the cases' reasoning. She also made smart choices about which cases to describe, choosing the ones that were most factually similar regardless of outcome.

Laura also demonstrated excellent legal research skills. For the graded research assessment, she had to research the Court Interpreters Act, answer questions about the Act, and describe her research processes. Both her research results and process were nearly flawless. Again, she excelled at finding and describing factual examples from case law that showed how the statutory language would apply to her client's facts.

Laura is a delight to work with. She contributed frequently to class discussions and was always prepared. I could rely on her to answer questions or share her approach to solving whatever problem we were working on in class. Outside of class, Laura worked hard to master the research and writing skills I teach. Although most assignments in my class are not graded, Laura always turned in polished and professional work, regardless of the assignment's graded or ungraded status. As I reviewed our email correspondence to write this letter, I saw again how conscientious Laura was when preparing to meet with me about her writing. I ask my students to email me questions about their drafts before we meet; this helps me know what each student wants to focus on and whether it matches what I think that student should focus on. Laura's questions were insightful. Early in the spring semester, she asked about how to translate concepts she had learned in the fall semester from a different professor into her new writing with me. She also asked detailed questions about the nuances of cases that she had used (or decided not to use) in her drafts.

In closing, I am confident that Laura will be an immediate asset to your chambers. She is very bright, writes beautifully, has strong interpersonal skills, accepts feedback well, and works effectively on her own and with others. I highly recommend her without reservation.

Sincerely yours,

Alexa Z. Chew
Clinical Professor of Law

Alexa Chew - achew@email.unc.edu - 919.843.6682

Bradley J. Bannon
Jennifer L. Bills
Christopher Brook
Burton Craige
Narendra K. Ghosh
Jonathan R. Harkavy
Michael G. Okun
Henry N. Patterson, Jr.
Trisha S. Pande
Paul E. Smith

Patterson | Harkavy
LLP

ATTORNEYS AT LAW
Chapel Hill • Greensboro

Of Counsel:
Nahomi Harkavy

To Whom It May Concern:

I write to offer my highest, most enthusiastic, and unequivocal recommendation in support of Laura Fisher's application for a clerkship. Having clerked in Federal District Court in 2001-2002 in Portland, Maine, I appreciate the necessary skills a law student must possess to excel in such a position, and anyone serving in the Judiciary will be lucky to have Ms. Fisher as a law clerk. I have come to know Ms. Fisher's outstanding research and writing acumen, as well as her superb critical thinking and insightful analysis, as she was a star student in my Disability Law Class in the Fall 2022 semester. As an Adjunct Professor at UNC Chapel Hill School of Law since 2016 and an attorney for over twenty years, I have encountered only a handful of law students whose stellar work ethic, sharp intelligence, and calm yet confident demeanor show that they would provide strong and reliable contributions in chambers. Ms. Fisher's wisdom and skills are top notch.

Ms. Fisher chose a challenging topic for her research paper in my intensive, Rigorous Writing Experience (RWE) seminar this year. She analyzed economic principles and conducted an international comparison of laws and policies related to people with disabilities. Ms. Fisher effectively utilized primary and secondary sources to create a cogent and interesting paper, which was a pleasure to read. Her citations were unerring, and her legal writing evidenced a mature voice. I could also reliably count on Ms. Fisher to contribute to lively class discussions. Ms. Fisher came well-prepared to every class meeting and contributed valuable and constructive commentary on caselaw, as well as perceptive insights on public policy issues. Additionally, Ms. Fisher eagerly sought criticism on her writing throughout the semester, and took full advantage of office hours, seeking guidance to strengthen her analysis and persuasive writing. In addition to being extremely intelligent, hard-working, and dedicated to her studies, Ms. Fisher appears to be a very well-rounded individual. Ms. Fisher volunteers many pro bono hours as a result of her commitment to justice for people with disabilities. Her talent has been widely recognized, garnering her a seat on the law review and distinctions including earning the highest grade in multiple classes.

Ms. Fisher will make a magnificent law clerk, and I encourage you to make her a part of your team. She is a bright light, a gifted student of the law, and she brings a pleasant and collegial attitude, with a keen sense of justice. Her candor and humor make her an ideal colleague, and I encourage you to give her the opportunity to serve in your chambers.

Please feel free to contact me if I may provide further information.

Very Sincerely Yours,



Jennifer L. Bills, Esq.

LAURA FISHER

820 W Knox Street, Durham, NC 27701
(919) 608 9456 | lfisher@unc.edu

This motion for summary judgment was written for a class in legal research and writing taken in the Spring of 2022. In this exercise, I represented the defendant. This was a closed universe assignment, and we were limited to using eight authorities which were a combination of cases and statutes. I removed the introduction and conclusion pages from the motion, so this writing sample only includes the statement of facts and my argument.

Statement of Facts

Rosa Cruz and her wife Ernestine began Hector's Restaurants as a way to celebrate the spirit of Cruz's deceased uncle and to feature authentic Mexican cuisine. (Def.'s Mot. Summ. J. Ex. B, 7:11-14.) Hector's flagship restaurant opened in Tempe, Arizona, in 2015. (Ex. B, at 4:17-21.) Hector's has expanded and now there are three new restaurants in Phoenix, Scottsdale, and Mesa. (*Id.* at 10:7.)

The Phoenix store struggled to find its footing and become financially stable. (*Id.* at 10:16-20.) Specifically, Hector's was selling far fewer authentic Mexican dishes in Phoenix than in its flagship store. (*Id.* at 12:5-8.) The restaurant attempted to boost sales by celebrating Mexican heritage through theme nights, but none of them caught on. (*Id.* at 12:11-19.) Eventually, out of fear of having to close, the Phoenix restaurant was forced to shift from being an authentic Mexican restaurant to being an American-style Mexican restaurant. (*Id.* at 13:12-22.) As part of this strategy, it began selling triangle-shaped menu items. (*Id.* at 14:5-9.) Specifically, it marketed "Triangle Taco Thursday," a weekday on which customers could buy triangle-shaped tacos. (*Id.* at 18:12-27.) Eventually, it had more customers on the weeknights that it sold triangle-shaped tacos than on other weeknights. (*Id.* at 19:1-2.) One of Hector's owners attributes that increase to customers appreciating the novelty of using triangle-shaped tortillas to create these menu items. (*Id.* at 19:1-4.) The Phoenix store has now stabilized financially and is no longer at risk of closing. (*Id.* at 10:17-21.)

Trilátero Tex-Mex first opened in 2007 in California and its owners have since expanded to open twenty additional restaurants. (Def.'s Mot. Summ. J. Ex. A, at 4:16-17,

5:5-6.) Since it opened, it has been serving certain menu items in the shape of triangles as opposed to the traditional round tortilla shape. (Ex. A, at 10:1-4.) The triangle shape is used by the restaurant as a tool to draw people in. (*Id.* at 14:10-12.) In fact, when creating the triangle-shaped tortilla concept for the restaurant, the owners specifically implemented it as a tool to make it stand out from the competition in the eyes of customers. (*Id.* at 8:26.)

The triangle tortilla concept is beneficial to the business. One of Trilátero's owners admits that the restaurant "would not have survived" without the concept. (*Id.* at 14:9.) Customers also benefit from the tortilla shape. When customers comment on the triangle-shaped tortillas, they usually say something along the lines of the tortillas creating a "fun" experience. (*Id.* at 18:25-30.) Sometimes, but not often, customers say that the shape makes the restaurant's tacos taste better. (*Id.* at 19:1-8.) Ten percent of the restaurant's Yelp! and Google reviews mention that the food tastes better because it is in a triangle shape. (*Id.* at 19:17-19.) Sometimes, but not often, customers also mention that they like that filling falls out of the tacos because of the triangle shape, giving them more to scoop up with chips later. (*Id.* at 19:1-8.) Lastly, some customers mention enjoying the ratio of filling to tortilla that the triangle shape creates. (*Id.* at 19:19.)

The triangle tortillas are part of Trilátero's marketing as well. (*Id.* at 15:13-21.) It primarily uses the slogan "it tastes better in a triangle" in its advertising materials. (*Id.* at 15:13-18.) Trilátero also ran an advertising campaign touting the benefit of the items inside the taco falling out onto the plate to be scooped up later. (*Id.* at 17:18-20.) These advertisements featured video of filling falling out of the taco, only to later be scooped up

with a tortilla chip. (*Id.* at 17:18-25.) The commercial implied that when filling falls out of the tortillas because of their shape, there is a bonus after your meal. (*Id.* at 18:1-3.)

Trilátero's process for making the triangle tortillas is similar to that of making round tortillas, requiring just one additional step. (*Id.* at 13:4-17.) Round tortillas are made with an automatic tortilla machine. (*Id.* at 12:9-14.) After the tortillas are made, they are cut into triangles. (*Id.* at 13:4-6.) This adds only one or two seconds per tortilla and the labor of the person cutting the tortillas into triangles. (*Id.* at 13:14-17.) There is no dough loss or added food cost associated with turning round tortillas into triangle tortillas. (*Id.* at 13:8-15.)

Trilátero sued Hector's for allegedly violating the federal Lanham Act. (Compl. ¶ 3.) Specifically, Trilátero alleges that its triangle-shaped tortillas constitute trade dress. (Compl. ¶ 23.) It claims Hector's violated that trade dress. (Def.'s Mot. Summ. J. 1.) There is no evidence that Trilátero has registered its trade dress with the United States Patent and Trademark Office. Hector's moved for summary judgment because Trilátero failed to meet its burden to show that the use of triangle-shaped tortillas is not functional, and therefore Trilátero cannot make a case for trade dress infringement. (*Id.*)

Argument

I. Summary judgment should be granted for Hector's because there is no genuine dispute of material fact supporting the finding that triangle-shaped tortillas are not functional.

Summary judgment should be granted when “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). To make this determination, the trial court should view the evidence in the light most favorable to the non-moving party. *Disc Golf Assoc., Inc. v. Champion Discs, Inc.*, 158 F.3d 1002, 1005 (9th Cir. 1998).

The Lanham Act provides a cause of action to one injured when a person uses “any word, term name, symbol, or device, or any combination thereof” which is likely to cause confusion about the “origin, sponsorship, or approval of his or her goods.” 15 U.S.C. § 1125(a)(1)(A). This protection extends to trade dress. *Traffix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 29 (1997). Trade dress includes the overall look of a product including features such as its design and shape. *Id.* at 28. When this overall look identifies the product with the source, it is a trade dress. *Id.*

One cannot recover for infringement of a trade dress unless they prove that 1) the feature in question is nonfunctional, 2) the feature is distinctive, and 3) there is likelihood of confusion among consumers. *Disc Golf*, 158 F.3d at 1005. Hector's argument focuses exclusively on the functionality element. (Def.'s Mot. Summ. J. 1.) In an action for trade dress infringement, when the trade dress is not registered, the party asserting trade dress protection has the burden of proving that the feature sought to be protected is not functional. 15 U.S.C. § 1125(a)(3).

A feature is functional if it is essential to the use or purpose of the product or if it affects said product's cost or quality. *TrafFix*, 532 U.S. at 34. This functionality doctrine exists to prevent businesses from inhibiting competition by controlling a useful product feature. *Id.* at 33. Exclusive use of a functional feature would put competitors at a significant non-reputation-related disadvantage. *Id.* at 34. Courts weigh three factors to determine whether a product is functional: “(1) whether the design yields a utilitarian advantage, (2) whether advertising touts the utilitarian advantages of the design, and (3) whether the particular design results from a comparatively simple or inexpensive method of manufacture.” *Disc Golf*, 158 F.3d at 1006. These factors are weighed collectively to determine if a feature is functional. *Id.*

Triangle-shaped tortillas are functional because they have all three factors in *Disc Golf*'s three-factor test. The tortillas have several utilitarian advantages including drawing customers into restaurants, improving food taste for some customers, and bettering the eating experience for some customers. Trilátero's marketing explicitly and implicitly touts the utilitarian advantages of taste and experience improvement. Lastly, the triangle-shaped tortillas have a relatively simple method of manufacture when compared to round tortillas. All three factors weigh in favor of functionality, proving that the triangle shape is functional and therefore not protectable trade dress.

A. Triangle-shaped tortillas yield several utilitarian advantages.

A product design has a utilitarian function when there is no evidence of any non-utilitarian design choices and the product's appearance follows from the product's

function. *Talking Rain Beverage Co. v. S. Beach Beverage Co.*, 349 F.3d 601, 603 (9th Cir. 2003). The inquiry about utility should not assess the utility of the whole product but should instead focus on the utility of the feature in question. *Disc Golf*, 158 F.3d at 1008. To be deemed functional, a feature only needs to have some utilitarian advantage, it need not have multiple utilitarian advantages. *Id.* at 1007.

When determining if there are utilitarian advantages of a product feature, the Ninth Circuit has assessed if there is a link between the feature's design and any useful benefits of said feature. *Talking Rain*, 349 F.3d at 603. In *Talking Rain*, the court held that the recessed grip design of a water bottle was functional. *Id.* at 602. There, the court determined that the grip design was not merely aesthetic—it served the utilitarian functions of helping users hold the water bottle and allowing the bottle to retain its shape for reuse. *Id.* at 603. Conversely, the Ninth Circuit held that the trapezoidal armrest shape and the one-piece construction of the seat and back of an Eames chair were primarily aesthetic design choices, yielding no utilitarian advantage. *Blumenthal Distrib., Inc. v. Herman Miller, Inc.*, 963 F.3d 859, 863 (9th Cir. 2020). There, the designers of the chair were likened to sculptors, developing the specific chair features in question for the non-utilitarian purpose of visual impact alone. *Id.*

Other circuits have looked to how a product is experienced to assess if a particular feature is functional. *Dippin' Dots, Inc. v. Frosty Bites Distrib., LLC*, 369 F.3d 1197, 1206 (11th Cir. 2004). No Ninth Circuit case addresses taste improvement as a functional benefit of a product feature, but the Eleventh Circuit considered it. *Id.* In *Dippin' Dots*, the plaintiff sued for trade dress regarding the design of its frozen ice cream product. *Id.*

at 1201. The court held that the product design was functional. *Id.* at 1207. There, the product's size had a direct impact on the taste of the ice cream, and the court held that the benefit of better taste weighed in favor of functionality. *Id.* at 1206. The court also brought in evidence that customers believed the shape of the product enhanced the ice cream's flavor to support the case for functionality. *Id.*

Here, the triangle tortilla shape serves several utilitarian functions, the first of which is drawing customers into restaurants because of the design novelty. Similar to the recessed grip design in *Talking Rain*, the triangle-shaped tortilla design has a purpose that goes beyond aesthetics. The triangle shape is used as a strategy to get customers in the door. (Ex. A, at 14:10-12.) For the restaurants who have implemented this design, it has been successful—customers are in fact drawn in because of the triangle tortilla. (See Ex. A, at 14:9; Ex. B, at 19:1-2.) Unlike the armrest design in *Herman Miller*, the triangle design has been implemented for reasons other than visual impact. The design of the tortilla follows its function—from its inception it has been a tool of differentiation and customer attraction. (Ex. A, at 8:25-26.)

The triangle-shaped tortillas need not serve more than one utilitarian purpose to be deemed functional, but in this case, they do. One additional function is enhanced taste. Similar to the size and shape of the ice cream in *Dippin' Dots*, the triangle shape of the tortillas improves the food's taste for some customers. (*Id.* at 19:1-8.) Another utilitarian advantage is that the triangle shape improves the eating experience in a number of ways. For some, the triangle shape creates a “fun” experience. (*Id.* at 18:25-30.) For others, the triangle shape creates a ratio of filling to tortilla that is appreciated. (*Id.* at 19:18-19.)

Lastly, some customers have commented on enjoying the fact that filling falls out of the side of triangle-shaped menu items. (*Id.* at 19:1-8.) Just as the recessed grip in *Talking Rain* improved customer experience by making the water bottle easier to grip, the triangle tortillas improve customer experience by making eating more enjoyable.

While Trilátero may argue that only some customers have commented on the taste and experience enhancement, the triangle shape only needs to have some utilitarian advantage to be deemed functional. Here, that the triangle-shaped tortillas provide some customers with an enhanced taste and experience, coupled with the fact that the tortillas are a tool to attract customers, proves that there are multiple utilitarian advantages of the triangle shape. Thus, this factor weighs in favor of the triangle-shaped tortillas being functional.

B. Trilátero's advertising explicitly and implicitly touts the utilitarian advantages of the triangle tortilla.

There is strong evidence that a product feature is functional if the seller advertises any of the utilitarian advantages of the feature. *Disc Golf*, 158 F.3d at 1008. The utilitarian advantages can be advertised in an implicit or explicit way. *Id.*

The Ninth Circuit has assessed the language and visuals within advertisements to gauge if the utilitarian advantage is featured. *Id.* In *Disc Golf*, a company alleged that its competitor infringed its trade dress for the parabolic chain design of a disc golf target. *Id.* at 1004. The court held that the chain design had the utilitarian function of improving catchability. *Id.* at 1007. The court then looked at the company's advertising, holding that the combination of photography showing a disc hitting the chain and being caught in the

basket with language about catchability, implicitly highlighted the functional value of the chain. *Id.* at 1008. Similarly, in *Talking Rain*, the court held that the water bottle’s slogan “Get a Grip!” highlighted the utilitarian function of easy grip. *Talking Rain*, 349 F.3d at 604. There, the court held that even though the slogan was a double-entendre that subtly emphasized the grip, the functional value was still clear. *Id.*

The Ninth Circuit does not discuss advertising that uses comparative language, but this concept was discussed by the Seventh Circuit. *Bodum USA, Inc. v. A Top New Casting, Inc.*, 927 F.3d 486, 493 (7th Cir. 2019). The Seventh Circuit uses the same three-factor test to assess functionality that is employed in Ninth Circuit cases. *Id.* at 492. In *Bodum*, the court determined that the design features of a coffee maker were not functional. *Id.* at 488. There, the court held that Bodum’s advertisements did not boast functional features partially because they did not use comparative language, that is, they never suggested that the design features in question made the coffee maker work better than other options. *Id.* at 493.

Here, Trilátero’s marketing explicitly and implicitly touts the utilitarian features of triangle-shaped tortillas. Trilátero primarily uses the slogan, “it tastes better in a triangle.” (Ex. A, at 15:13-18.) This slogan explicitly highlights the utilitarian function of taste improvement. Unlike the slogan in *Talking Rain*, there is no double-entendre or subtlety to this message—one utilitarian advantage of the triangle shape is front and center. Additionally, unlike in *Bodum*, there is comparative advertising at play, weighing in favor of functionality. “It tastes better in a triangle” indicates that the triangular shape makes the food taste better than other options. Lastly, similar to the advertisements in

Disc Golf, Trilátero’s commercials touting the benefit of items inside the taco falling out onto the plate implicitly highlights the utilitarian advantage of enhanced dining experience. These commercials pair visuals with language that subtly reinforces the advantage of having filling fall out of the tacos. (*Id.* at 17:18-26.) As was the case in *Disc Golf*, this implicit highlighting of a benefit is enough to show functionality.

The slogan “it tastes better in a triangle” much more explicitly touts a utilitarian advantage than advertising in other Ninth Circuit cases. In those other cases, the advertising factor of the *Disc Golf* test still weighed in favor of functionality, despite the utilitarian advantage being marketed more implicitly. The explicit slogan, coupled with the additional advertising that Trilátero does to implicitly market a second utilitarian advantage of enhanced eating experience, proves that the advertising factor of the *Disc Golf* test weighs strongly in favor of functionality.

C. The triangle tortillas are relatively simple to manufacture.

A feature is likely functional when its method of manufacture is comparatively simple. *Talking Rain*, 349 F.3d at 604. Courts have looked for evidence regarding whether or not the product was “relatively simple or inexpensive to manufacture” in assessing functionality. *Disc Golf*, 158 F.3d at 1008. In *Herman Miller*, the court used testimony that spoke to the “specialized technical equipment” needed to manufacture the trapezoidal frame and one-piece seat and back. *Herman Miller*, 963 F.3d at 864. The court determined that using this equipment proved that the design features did not use a

simple or inexpensive method of manufacture, and therefore this factor weighed in favor of nonfunctionality. *Id.*

Unlike the Ninth Circuit, the Seventh Circuit has explicitly analyzed the difference between production of two products to assess comparative simplicity. *Bodum*, 927 F.3d at 494. In *Bodum*, the court considered testimony about the expense of making a coffee maker—the Chambord—with the design features in question. *Id.* It compared the Chambord’s cost of production to another coffee maker, the Bistro, without said features, noting that the Bistro cost less than half of what it costs to produce the Chambord. *Id.* The Bistro also used less material in production. *Id.* Because the Chambord was not comparatively simple to manufacture, this weighed in favor of nonfunctionality. *Id.*

Here, evidence suggests that the process for making triangle tortillas is relatively simple when compared to making round tortillas. Turning round tortillas into triangle tortillas only adds one to two seconds per tortilla. (Ex. A, at 13:4-17.) When compared with the significant difference in cost of production between coffee makers in *Bodum*, this additional one to two seconds needed to produce triangle tortillas is negligible. Unlike in *Bodum*, the triangle tortillas do not use more material—there is no dough loss associated with the process. (*Id.* at 13:8-15.) Because the process to make triangle tortillas takes only slightly more time and no additional material, there is evidence that the process is relatively simple compared to making round tortillas.

Unlike the process in *Herman Miller*, turning round tortillas into triangles does not require any specialized equipment. While Trilátero does use an automatic tortilla-maker, this machine is not used specifically to create the triangle-shaped tortillas. Instead, it is

used to make round tortillas which are then cut into triangles by hand. (*Id.* at 12:9-14, 13:4-7.) Conversely, in *Herman Miller*, the specific design features in question—the trapezoidal frame and the seat—required specialized equipment.

The evidence shows that all three factors of utility, advertising, and simplicity of manufacture weigh in favor of functionality. There is no genuine dispute of material fact supporting the finding that triangle-shaped tortillas are not functional. This demonstrates that Trilátero has not met its burden of proving that triangle tortillas are not functional.

Applicant Details

First Name **James**
 Middle Initial **W**
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94089
Country
United States

Contact Phone Number **4086135521**

Applicant Education

BA/BS From **University of California-Berkeley**
 Date of BA/BS **May 2019**
 JD/LLB From **The University of Michigan Law School**
<http://www.law.umich.edu/currentstudents/careerservices>
 Date of JD/LLB **May 6, 2024**
 Class Rank **School does not rank**
 Law Review/Journal **Yes**
 Journal(s) **Michigan Law Review**
 Moot Court Experience **No**

Bar Admission**Prior Judicial Experience**

Judicial Internships/
 Externships **No**

Post-graduate Judicial
Law Clerk **No**

Specialized Work Experience

Professional Organization

Organizations **Just the Beginning Organization**

Recommenders

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Halberstam, Daniel
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Litman, Leah
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734-647-0549

This applicant has certified that all data entered in this profile and any application documents are true and correct.

James “Tre” Fitts III

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June 12, 2023

The Honorable Jamar K. Walker
U.S. District Court for the Eastern District of Virginia
Walter E. Hoffman U.S. Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am a rising third-year student at the University of Michigan Law School, and I am writing to apply for a clerkship in your chambers for the 2024 term or a later term. As a Black, gay man, it would be a particularly special experience, for me, to clerk for you. I would bring to your chambers my ability to move as fast as possible but as slowly as required, my capacity to navigate delicate situations with patience and empathy, and my resolve to engage difficult questions with curiosity.

Prior to law school, I spent time working to find the best way to serve children and families. This journey began at Wonderschool, a San Francisco-based startup that increases community access to quality early childhood education. It was at Wonderschool where I learned the value in moving as fast as possible, but as slowly as required, and to balance efficiency with creativity.

Since entering law school, I have remained committed to helping children and families. At the beginning of my 2L year, I volunteered for the Child Advocacy Law Clinic, where I completed casework for clients navigating neglect and abuse cases. My prior experience working with children has informed my lawyering style: I approach each client interaction with patience and empathy, and I approach each challenge with an open mind and an eye for nuance. I have also pursued research opportunities involving children and families. As research assistant to Professor Vivek Sankaran, I research terminations of parental rights. Not only do I engage my work with curiosity, but I also bring my whole self to each research assignment: my experiences as a Black, gay man inspire me to thoroughly question and explore what might otherwise be overlooked when assessing each child’s best interests.

I’ve also become a leader in my community. This year, I was elected to serve as the Executive Development Editor of the *Michigan Law Review*. Tasked with leading the Journal’s diversity, equity, and inclusion efforts, this role often requires me to make quick decisions based on the potential effects on both Journal members and the recruitment of future membership. This has sharpened my decision-making capabilities by challenging me to think clearly, carefully and creatively in striving to diversify our community through equitable write-on and selection policies.

Additionally, I have taken advantage of my unique opportunity to spend three summers at global law firms, Morrison & Foerster LLP and Gibson, Dunn & Crutcher LLP. These experiences have not only catalyzed my interest in civil litigation, but they have also encouraged me to both explore new legal issues and expand my wide array of legal interests.

I would greatly appreciate the chance to gain a new perspective on the litigation process and learn from you as your clerk. I believe that my identity, my experiences, and the many lessons that I carry with me as a result would allow me to contribute to the work of your chambers. Thank you for your time and consideration.

Respectfully,

Tre Fitts

James “Tre” Fitts III

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EDUCATION

UNIVERSITY OF MICHIGAN LAW SCHOOL

Juris Doctor

Ann Arbor, MI
Expected May 2024

Journals: *Michigan Law Review*, Executive Development Editor, Vol. 122
Awards: Alden J. “Butch” Carpenter Memorial Scholarship Award; Dean’s Scholar
Activities: Senior Judge for Professor Kornblatt (teaching assistant for first-year legal writing course)
Henry M. Campbell Moot Court Board, Judge Chair (community nominated; faculty selected)
Research Assistant for Professor Vivek Sankaran (researching terminations of parental rights)
Alden J. “Butch” Carpenter Memorial Scholarship Gala Co-Chair
Black Law Students Association – Media Chair; Admissions Committee
OUTLaws – Member

UNIVERSITY OF CALIFORNIA, BERKELEY

Bachelor of Arts in Media Studies, *High Distinction (magna cum laude)*

Berkeley, CA
May 2019

Honors: Phi Beta Kappa; Media Studies Departmental Honors
Thesis: “Use Your Black Voice”: The Racialization of Anthropomorphic Animals in Animated Films
Activities: UC Berkeley School of Education – Undergraduate Student Instructor; Kesem Berkeley – Outreach

EXPERIENCE

MORRISON & FOERSTER LLP

2L Wetmore Fellow for Excellence, Diversity and Inclusion (Litigation Summer Associate)

San Francisco, CA
July 2023 – Aug. 2023

1L Wetmore Fellow for Excellence, Diversity and Inclusion (Litigation Summer Associate)

May 2022 – July 2022

- Counseled client regarding their strategic response to a demand letter alleging copyright infringement.
- Researched and wrote memo assessing the viability of a trademark infringement claim for client.
- Wrote memo for partner regarding California trade secrets law in preparation for mediation.

SEO (Sponsors for Educational Opportunity) Law Fellow

June 2021 – July 2021

- Drafted facts section of complaint alleging multiple civil rights causes of action for pro bono client.

GIBSON, DUNN & CRUTCHER LLP

Litigation Summer Associate & Diversity Scholar

Los Angeles, CA
May 2023 – Present

CHILD ADVOCACY LAW CLINIC

Student Attorney

Ann Arbor, MI
August 2022 – December 2022

- Managed casework for three clients navigating child neglect and abuse cases through written and oral advocacy, out-of-court advocacy, and client counseling.

UNIVERSITY OF HOUSTON, GRADUATE COLLEGE OF SOCIAL WORK

Research Assistant, UpEND Movement

Houston, TX
May 2020 – May 2021

- Collected and analyzed research and data regarding the harmful impacts and racial disparities that manifest within the various intervention decision points in the foster care system.

ILK (NOW FOREWORD)

Founding Member & Head of Strategy and Brand Development

San Francisco, CA
December 2019 – May 2020

- Ilk was a Y Combinator (Summer 2020) startup that helped parents establish community childcare systems.
- Conducted user research and collected data to develop high-level branding and acquisition strategies.

WONDERSCHOOL

Customer Success & Demand Funnel Growth

San Francisco, CA
Jun. 2019 – Nov. 2019

- Managed a portfolio of 300 parents searching for childcare: identified needs, located programs, booked tours, negotiated tuition, and enrolled them in a program.

ADDITIONAL

Volunteer: Kesem Michigan – Advisory Board Member; UC Berkeley Black Alumni Recruitment Committee

Personal Interests: Dodger baseball, Volleyball, Soccer, Film photography, Animated storytelling, HGTV

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Issue Date: 06/06/2023

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The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Fitts, James Winston

Student#: 64896170



Paul R. Fitts
University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Towards Program	Credit Grade
Fall 2021 (August 30, 2021 To December 17, 2021)								
LAW	510	002	Civil Procedure	Richard Friedman	4.00	4.00	4.00	B
LAW	530	001	Criminal Law	JJ Prescott	4.00	4.00	4.00	B
LAW	580	002	Torts	Sherman Clark	4.00	4.00	4.00	B
LAW	593	007	Legal Practice Skills I	Kerry Komblatt	2.00		2.00	S
LAW	598	007	Legal Pract:Writing & Analysis	Kerry Komblatt	1.00		1.00	S
Term Total				GPA: 3.000	15.00	12.00	15.00	
Cumulative Total				GPA: 3.000		12.00	15.00	
Winter 2022 (January 12, 2022 To May 05, 2022)								
LAW	520	002	Contracts	Gabriel Rauterberg	4.00	4.00	4.00	B+
LAW	540	001	Introduction to Constitutional Law	Leah Litman	4.00	4.00	4.00	B+
LAW	594	007	Legal Practice Skills II	Kerry Komblatt	2.00		2.00	S
LAW	737	001	Higher Education Law	Jack Bernard	4.00		4.00	P
Term Total				GPA: 3.300	14.00	8.00	14.00	
Cumulative Total				GPA: 3.120		20.00	29.00	

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The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Fitts, James Winston

Student#: 64896170



University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Towards Program	Grade
Fall 2022 (August 29, 2022 To December 16, 2022)								
LAW	664	002	European Union Law	Daniel Halberstam	3.00	3.00	3.00	A-
LAW	747	001	Taxation of Individual Income	Reuven Avi-Yonah	4.00	4.00	4.00	A
LAW	910	001	Child Advocacy Clinic	Joshua Kay	4.00	4.00	4.00	A-
LAW	911	001	Child Advocacy Clinic Seminar	Frank Vandervort	3.00	3.00	3.00	A-
Term Total				GPA: 3.785	14.00	14.00	14.00	
Cumulative Total				GPA: 3.394	34.00	43.00		
Winter 2023 (January 11, 2023 To May 04, 2023)								
LAW	518	001	Race and the Law	Michelle Adams	3.00	3.00	3.00	B+
LAW	577	001	Intellectual Property Survey	David Blankfein-Tabachnick	3.00	3.00	3.00	A-
LAW	612	001	Alternative Dispute Resolution	Allyn Kantor	3.00	3.00	3.00	A
LAW	669	002	Evidence	Len Niehoff	4.00	4.00	4.00	B+
Term Total				GPA: 3.553	13.00	13.00	13.00	
Cumulative Total				GPA: 3.438	47.00	56.00		

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The University of Michigan Law School
Cumulative Grade Report and Academic Record

Name: Fitts, James Winston
Student#: 64896170



Paul R. Fitts
University Registrar

Course		Section	Load		Graded	Towards
Subject	Number	Number	Course Title	Instructor	Hours	Hours

Fall 2023 (August 28, 2023 To December 15, 2023)

Elections as of: 06/06/2023

LAW	463	001	Right of Assembly	Tabatha Abu El-Haj	2.00	
LAW	617	001	Anatomy of a Commercial Trial	Norman Ankers	3.00	
LAW	760	001	Trademarks and Unfair Competition	Jessica Litman	4.00	
LAW	799	001	Senior Judge Seminar	Ted Becker	2.00	
LAW	929	001	Child Welfare Appellate Clinic	Vivek Sankaran	5.00	
				Timothy Pinto		

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University of Michigan Law School Grading System

Honor Points or Definitions

Through Winter Term 1993	Beginning Summer Term 1993
A+ 4.5	A+ 4.3
A 4.0	A 4.0
B+ 3.5	A- 3.7
B 3.0	B+ 3.3
C+ 2.5	B 3.0
C 2.0	B- 2.7
D+ 1.5	C+ 2.3
D 1.0	C 2.0
E 0	C- 1.7
	D+ 1.3
	D 1.0
	E 0

Other Grades:

- F Fail.
- H Top 15% of students in the Legal Practice courses for students who matriculated from Spring/Summer 1996 through Fall 2003. Top 20% of students in the Legal Practice courses for students who matriculated in Spring/Summer 2004 and thereafter. For students who matriculated from Spring/Summer 2005 through Fall 2015, "H" is not an option for LAW 592 Legal Practice Skills.
- I Incomplete.
- P Pass when student has elected the limited grade option.*
- PS Pass.
- S Pass when course is required to be graded on a limited grade basis or, beginning Summer 1993, when a student chooses to take a non-law course on a limited grade basis.* For SJD students who matriculated in Fall 2016 and thereafter, "S" represents satisfactory progress in the SJD program. (Grades not assigned for LAW 970 SJD Research prior to Fall 2016.)
- T Mandatory pass when student is transferring to U of M Law School.
- W Withdrew from course.
- Y Final grade has not been assigned.
- * A student who earns a grade equivalent to C or better is given a P or S, except that in clinical courses beginning in the Fall Term 1993 a student must earn a grade equivalent to a C+ or better to be given the S.

MACL Program: HP (High Pass), PS (Pass), LP (Low Pass), F (Fail)

Non-Law Courses: Grades for these courses are not factored into the grade point average of law students. Most programs have customary grades such as A, A-, B+, etc. The School of Business Administration, however, uses the following guides: EX (Excellent), GD (Good), PS (Pass), LP (Low Pass) and F (Fail).

Third Party Recipients

As a third party recipient of this transcript, you, your agents or employees are obligated by the Family Rights and Privacy Act of 1974 not to release this information to any other third party without the written consent of the student named on this Cumulative Grade Report and Academic Record.

Official Copies

An official copy of a student's University of Michigan Law School Cumulative Grade Report and Academic Record is printed on a special security paper with a blue background and the seal of the University of Michigan. A raised seal is not required. A black and white is not an original. Any alteration or modification of this record or any copy thereof may constitute a felony and/or lead to student disciplinary sanctions.

The work reported on the reverse side of this transcript reflects work undertaken for credit as a University of Michigan law student. If the student attended other schools or colleges at the University of Michigan, a separate transcript may be requested from the University of Michigan, Office of the Registrar, Ann Arbor, Michigan 48109-1382.

Any questions concerning this transcript should be addressed to:

Office of Student Records
University of Michigan Law School
625 South State Street
Ann Arbor, Michigan 48109-1215
(734) 763-6499

UNIVERSITY OF MICHIGAN LAW
Legal Practice Program
801 Monroe Street, 945 Legal Research
Ann Arbor, Michigan 48109-1210

Kerry Kornblatt
Clinical Assistant Professor of Law

June 10, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write this letter of recommendation in support of Tre Fitts's judicial law clerk application. Tre was a student in my year-long Legal Practice course (which is Michigan's legal research and writing course). He'll also be serving as a teaching assistant for me next school year. I am pleased to recommend him.

Tre was one in a class of 20 that I taught for the entire 2021-22 school year. Tre's work was strong and he received a "pass" in my class. (The class is graded on a modified pass/fail system; I am permitted to give a "high pass" to those scoring in the top fifth of the class.)

While Tre did well in my class, his "pass" isn't the whole story. Tre was a regular and thoughtful contributor in class who made our class sessions better. He also showed impressive development over the course of the year. In his major first semester assignment (the research memo), he scored right around the middle of the class. By the second semester, his major writing assignment (the trial brief) scored closer to the top third. Among the particular strengths in Tre's brief were his persuasive tone, thoughtful signaling and labeling to guide the reader through his points, and his impressive editing process resulting in an incredibly polished brief. (All qualities that translate nicely to clerkship writing tasks.)

Tre's improvement in my class was the product of keeping at it, learning from feedback, and adjusting. One glance at his resume reveals that his resiliency and commitment to developing his legal skills is clearly not something that was unique to my class. Tre is plainly a student who is building strength every year in law school. When we spoke about his clerkship interest, he told me he was "not the same student that was a year ago." He didn't mean it in a bragging way; he just wanted me to know that he was taking full advantage of the opportunities he had to learn and grow as a law student. His grades reflect that growth, as well as his deep involvement in numerous aspects of life at Michigan Law.

About that deep involvement. Tre is the kind of student who forms the connective tissue in a law school community. As reflected in his resume, Tre is very active at Michigan. But, the listing of his leadership positions and activities doesn't fully do justice to his role in the law school community. One example? As last year's recipient of the Butch Carpenter Memorial Scholarship, Tre was tapped to co-chair this year's Butch Carpenter Memorial Scholarship Gala. Through my conversations with him, I learned that this involved wedding-level event planning over the past year. The nature of his commitment was made clear to me just last week, when we ran into each other at the law school sometime between 11pm and midnight. I was staying late grading; he was working on Gala plans. We compared notes and agreed that 1) we were up way too late, and 2) we both really valued what we were doing. Grading is my job, though. Tre's efforts are above and beyond his role as law student.

In addition to his commitment to the law school community, Tre happens to be an incredibly warm and engaging person. He is obviously well-liked by his colleagues. In the small community of a judicial chambers, Tre is just the kind of person you want.

Because of all of his standout qualities, I asked Tre to serve as a teaching assistant for my class next year. My teaching assistants play a central role in my class—they hold regular conferences with students, they review and comment on student writing assignments, and they plan writing workshops and other substantive programming. I'm confident Tre will excel in the role. And his approach to being a student—his resiliency and dedication to getting it right—is precisely the kind of example I want my first-years to emulate.

For all of these reasons, Tre would be a truly valuable addition to any judicial chambers. If you have any questions, or if I can be of further assistance, please do not hesitate to contact me.

Sincerely,

/Kerry Kornblatt/

Kerry Kornblatt
Clinical Assistant Professor of Law

Kerry Kornblatt - kkorn@umich.edu

UNIVERSITY OF MICHIGAN LAW
701 South State Street
Ann Arbor, MI 48109

SHERMAN J. CLARK
Kirkland & Ellis Professor of Law

June 10, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

RE: Recommendation for James “Tre” Fitts

Dear Judge Walker:

James “Tre” Fitts may have taken a term or two to find his academic stride; but has he ever. Tre is a terrific student who will be a very good and reliable clerk and lawyer. He was in my torts class; and I have had a chance to talk with and get to know him outside of class. Tre is a very smart, very hard-working guy who just wants to stick up for people who need it.

Tre is a very strong student—combining substantial raw intellectual horsepower with a solid work ethic. He was always prepared for class, always on top of the material, and always willing and able to contribute to the class conversation when called upon.

He has the ability to analyze difficult issues quickly and clearly, without losing the forest for the trees. What this means is that he also is able to see and understand the connections between issues—rather than getting caught up in the minutia and losing the bigger picture.

Tre is also both careful and creative. He is never careless. He reads carefully and makes sure to get things right. But at the same time he is not narrow or a drudge. On the contrary, he is creative and thoughtful in looking beyond the obvious categories and obvious implications of legal and policy issues.

Tre is also genuinely and deeply engaged with his education. He is not a grade grubber. Rather, he studies and works hard because he truly wants to learn. That attitude is also evident in the good and thoughtful points and questions he raises in class discussions.

Tre is also truly dedicated to public service. I hope you have a chance to get to know him and learn about his aspirations. I have no doubt that he will be an excellent and valuable clerk and lawyer—one I will be proud to have taught and you will be proud to have employed and helped train.

Sincerely,
Sherman J. Clark

Sherman Clark - sjclark@umich.edu - 734-647-4039

UNIVERSITY OF MICHIGAN LAW SCHOOL
625 South State Street
Ann Arbor, Michigan 48109-1215

Daniel H. Halberstam
Eric Stein Collegiate Professor of Law
Director, European Legal Studies

May 23, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am pleased to write in support of James "Tre" Fitts, who has applied for a clerkship in your chambers. Tre is a thoughtful young lawyer who will make a fine law clerk and future attorney.

I came to know Tre when he took my Introduction to European Union law last fall. The class is essentially an introduction to the constitutional architecture and fundamental rights of the EU, rather similar to my Introduction to (U.S.) Constitutional Law for J.D. students. Tre was highly interested in the subject, always came prepared to class, and was ready to engage with highly productive comments and questions.

For his research paper in EU law, Tre wrote a concise and effective piece deftly analyzing the jurisprudence of the Court of Justice of the European Union ("CJEU") on same-sex marriage. The paper considers the CJEU's Pancharevo decision establishing the right of a child of a same-sex couple to obtain a birth certificate from their "home" state in connection with the exercise of their right to free movement under the EU Treaties. Tre considers this judgment in light of cases of the European Court of Human Rights ("ECtHR") under the European Convention of Human Rights to weigh in on how the CJEU might decide a follow-up case that does not also involve the exercise of free movement rights. Drawing on ECtHR caselaw by analogy, Tre argues that the CJEU should expand its Pancharevo decision beyond the context in which the relevant citizens move from one Member State to another, and provide equivalent substantive rights to "rainbow" families who simply reside in any given Member State. At the same time, however, he argues, again based on relevant ECtHR decisions, that the CJEU should not (at this point) require EU Member States to recognize the same-sex marriage as such, but only to provide same-sex couples with rights equivalent to marriage.

For an independent research paper on a subject of EU law that we had not covered in class at all, Tre did a great job. To be sure, his half-way solution leaves certain questions unanswered, such as whether his solution is proposed as a strategic proposal or as a principled position (and, if the latter, how such a position might be defended, as a matter of principle). Nevertheless, it nicely researches and presents the relevant caselaw and stakes out a practical position in the way a lawyer might do in a brief.

In my conversations with Tre, his passion as a lawyer for child welfare issues was palpable. It was surely an energizing factor in tackling this difficult area of EU law. More broadly, in our conversations in and outside of class, Tre always came across as a young maturing lawyer of utmost seriousness and integrity.

In summary, I recommend Tre Fitts to you most highly. I have no doubt he would make a very fine clerk. Please do not hesitate to contact me with any questions you may have.

Yours sincerely,

Daniel H. Halberstam

Daniel Halberstam - dhalber@umich.edu - 734-763-4408

University of Michigan
Law School

Leah Litman
Professor of Law

June 10, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I'm pleased to write this letter of recommendation for James ("Tre") Fitts, who has applied for a clerkship in your chambers. Tre is an extremely personable, hard-working student who started to excel at law school once he had two semesters under his belt. I think he'll make a good law clerk, and I also think he'll be someone you'll be delighted to have around your chambers and very happy to know thereafter. Because I think so highly of Tre, I also reached out to one of my colleagues, Prof. Vivek Sankaran, whom Tre is doing some research for and have included his thoughts on Tre's candidacy in this letter as well.

I got to know Tre as a student in my winter 2022 introduction to constitutional law class. While the class is large, I call on a large number of students each class session so I end up speaking with all of the students about once per week. I also offer the students an interim assignment, so I saw an interim writing assignment from the students in addition to a final exam.

Tre was a delight to have in class. He was bright, focused, and had the best attitude you can have as a law student – an eagerness to learn and get better and better at what he was doing. He knew the materials, of course. But he was also happy to engage with the bigger-picture conceptual or methodological questions that can be more of a quagmire. And when I'd follow up with him with some pushback, he was always ready to pause, collect himself, and keep at it – and do well in the process.

Tre's written work was good even though he didn't end up writing an exam that put him at the top of the class. I really do think his grades during his first year are a product of him figuring out the law school exam thing over time, and are not a complete picture of the kind of law clerk he would be. I think the upward trajectory of his grades better captures Tre's skills and work ethic – as do the many different leadership positions he's taken on during that time. Tre's peers hold him in high esteem and rightfully so.

Interpersonally, Tre is absolutely someone I would love to have around chambers. He's friendly and personable, but still professional. He brought his mother to con law one day and we still joke about how she likes to tell her friends all about substantive due process and unenumerated rights because of what she learned that day. He really is a delight and someone who's going to go places not just because of his analytical abilities and work ethic, but also because he's just plain fun to work with.

Because I think so highly of Tre – and only seen written work he's done in the context of exam constraints – I reached out to my colleague, Prof. Vivek Sankaran, since Tre is doing research for him in the winter 2023 semester. Prof. Sankaran had this to say about Tre's work:

[Tre has] been my RA since the beginning of the year and has done amazing work for me. I've had him do a deep dive into caselaw in Alabama around their termination of parental rights jurisprudence and he has done such great stuff. Alabama has really interesting case law involving TPRs drawing from a federal case in the 1970s that held that any state child welfare statute would have to pass strict scrutiny. Alabama state appellate courts embraced that federal decision and incorporated that logic to evaluate TPR decisions, requiring the state to show that no other alternatives to TPR exist before granting a request. It's the only state in the country with this caselaw. Tre researched all of this and showed me how the law developed through the history of caselaw.

His research has been very meticulous and his memos are incredibly well-written. He is clear, pulls relevant details and is super well organized. I incorporated his research into an article generally about the constitutional framework around TPRs that is being published in the Family Court Review and am working on an article specifically on Alabama this summer. His research will be the foundation for that piece.

I actually think he is the best RA I've had. I could rearrange his work into an article super easily and plan to. I might also ask him to co-author it with us. And he's delightful to work with. I'm so grateful to have run into him!

Prof. Sankaran is an incredible litigator who regularly appears in the Michigan Supreme Court, and his recommendation of Tre confirms my belief that he's going to be a great law clerk – and a much better clerk than his grades (particularly his first semester grades) might suggest.

Tre is especially interested in working in the family law space and on behalf of juveniles. I think he will have a very promising career in that field.

If you have any questions I'm happy to answer them. I can be reached by phone (734-647-0549) or email (lmlitman@umich.edu).

Leah Litman - lmlitman@umich.edu - 734-647-0549

For whatever it is worth, I clerked for two years (once on the U.S. Court of Appeals for the Sixth Circuit and once on the U.S. Supreme Court), and I think Tre has what it takes to succeed as a law clerk. I very much hope you give his application close consideration.

Sincerely,

Leah M. Litman

Leah Litman - lmlitman@umich.edu - 734-647-0549

James “Tre” Fitts III**Writing Sample 1**

This writing sample is a legal memorandum that I wrote as a summer associate at Morrison Foerster LLP. The assignment was given to me by a partner at the firm in the Intellectual Property group. The factual basis for this assignment was as follows: Our client, “PARTY A,” gave license to the opposing party, “PARTY B,” to market trademarked products owned by PARTY A. Our client, PARTY A, sought to bring a reverse passing off trademark claim against PARTY B when they discovered that PARTY B marketed goods, developed from products owned by PARTY A, under the trademark of PARTY B. This assignment required me to research (1) how the Ninth Circuit interprets the meaning of “origin of goods” when adjudicating trademark claims, and (2) whether our client could bring a viable reverse passing off trademark claim against another party. This writing sample is entirely self-edited.

MORRISON FOERSTER

MEMORANDUM

TO: PARTNER

FROM: Tre Fitts

DATE: June 2, 2022

RE: Reverse Passing Off Claim against PARTY B

This memorandum addresses how the Ninth Circuit interprets the phrase “origin of goods” when adjudicating reverse passing off false designation of origin claims. This memorandum also considers the viability of a potential reverse passing off claim brought against PARTY B.

PARTY A likely does not have a viable reverse passing off claim against PARTY B because PARTY A is the owner of the intellectual property used to develop the GOODS but is not the producer of the actual GOODS offered for sale.

I. Summary of Facts

PARTY A, the seller, entered a licensing agreement with PARTY B, the licensee, which includes terms allowing PARTY B to market GOODS from PRODUCTS owned by PARTY A and covered under PARTY A trademarks. Based on the facts available, we understand that these PRODUCTS are owned by PARTY A and that the PRODUCTS are the intellectual property of PARTY A. Further, we understand that PARTY B marked GOODS developed from PARTY A-owned PRODUCTS under its own trademarks. In response, PARTY A seeks to bring a reverse passing off claim against PARTY B.

II. Reverse Passing Off Statutory Framework

III ORRISON FOERSTER

The purpose of the Lanham Act is to protect consumers from deception and confusion. *See New West Corp. v. N.Y.M. Co. of California*, 595 F.2d 1194, 1201 (9th Cir. 1979). Section 43(a) of the Lanham Act prohibits use of “any word, term, name, symbol, or device...which...is likely to cause confusion...as to the origin...of [their] goods.” *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 37 (2003) (citing 15 U.S.C. § 1125(a)). Section 43(a) of the Lanham Act gives rise to false designation of origin claims for which there are two types: (1) “passing off” and (2) “reverse passing off.” *Id.* at 27. Passing off “occurs when a producer misrepresents his own goods or services as someone else’s.” *Id.* Reverse passing off occurs when “the producer misrepresents someone else’s goods or services as [their] own.” *Id.*

a. Elements of False Designation of Origin Claims

Within the Ninth Circuit, a successful false designation of origin claim must show that “(1) defendant uses a designation (any word, term, name, device, or any combination thereof) or false designation of origin; (2) the use was in interstate commerce; (3) the use was in connection with goods or services; (4) the designation or false designation is likely to cause confusion, mistake, or deception as to (a) the affiliation, connection, or association of defendant with another person, or (b) as to the origin, sponsorship, or approval of defendant's goods, services, or commercial activities by another person; and (5) the plaintiff has been or is likely to be damaged by these acts.” *Zamfir v. Casperlabs, LLC*, 528 F. Supp. 3d 1136, 1143 (S.D. Cal. 2021) (citing *United Tactical Sys., LLC v. Real Action Paintball, Inc.*, 143 F. Supp. 3d 982, 1015 (N.D. Cal. 2015)). Because reverse passing off is a form of false

III. HARRISON FOERSTER

designation of origin, the aforementioned elements also apply to reverse passing off claims, and rely on a determination of the “origin” of the goods at issue.

b. Definition of “Origin” in Supreme Court Precedent

A party that produces the product at issue constitutes the product’s origin; and, origin cannot be tied back to copyrightable or patentable designs, ideas, or concepts. *Dastar*, 539 U.S. 23, 36–37 (2003). In *Dastar*, the Supreme Court held that the phrase “origin of goods” in the Lanham Act “refers to the producer of the tangible goods that are offered for sale, and not to the author of any idea, concept, or communication embodied in those goods.” *Id.* at 37. The Court concluded that the plaintiff did not present a valid reverse passing off claim because the plaintiff was not the producer of the product at issue—clothes—reasoning that “the Lanham Act referred to the producer of the clothes, and not the producer of the (potentially) copyrightable or patentable designs that the clothes embodied.” *Id.* at 36–37.

III. A Reverse Passing Off Claim Against PARTY B Would Likely Not Succeed

If PARTY A brings a reverse passing off claim against PARTY B, it is unlikely that the claim will succeed. The Supreme Court in *Dastar Corporation v. Twentieth Century Fox Film Corporation* established precedent declining to validate reverse passing off claims where the plaintiff does not produce the good at issue. 539 U.S. 23 (2003). The Ninth Circuit has followed suit. See *OTR Wheel Eng’g, Inc. v. W. Worldwide Servs., Inc.*, 897 F.3d 1008 (9th Cir. 2018).

a. Application of *Dastar* in the Ninth Circuit

The Ninth Circuit has continuously adhered to the Supreme Court’s precedent in *Dastar*. At the appellate level, the Ninth Circuit applied the Supreme Court’s *Dastar* holding

III ORRISON FOERSTER

in *OTR Wheel Engineering, Inc. v. West Worldwide Services, Inc.* There, the court declined to permit a reverse passing off claim brought against the defendant on the grounds that the defendant copied the plaintiff's tire product design to create identical tires. The court held that "a reverse passing off claim cannot be brought to prevent the copying of intellectual property." *OTR Wheel Eng'g, Inc. v. W. Worldwide Servs., Inc.*, 897 F.3d 1008, 1016 (9th Cir. 2018). The court concluded that customers would likely not be confused regarding the origin of the product at issue. *Id.* at 1019.

The Supreme Court's holding in *Dastar* is similarly applied in Ninth Circuit district court jurisprudence. In *Williams v. UMG Recordings*, the U.S. District Court for the Central District of California adopted the Supreme Court's holding in *Dastar*, denying the plaintiff's reverse passing off claim that asserted ownership of a film that the plaintiff contributed to without receiving credit. 281 F. Supp. 2d 1177, 1184 (C.D. Cal. 2003). The court held that a reverse passing off claim is not actionable where a defendant is "accused only of failing to identify someone who contributed not goods, but ideas or communications...to [a defendant's] product." *Id.* at 1184. The court reasoned that while the plaintiff "would have a claim if defendants purchased copies of plaintiff's goods...and repackaged them as their own," the plaintiff's "authorship and direction embodied in the film" at issue do not provide sufficient grounds for a valid reverse passing off claim. *Id.* at 1183. Further, the court concluded that the *Dastar* holding does not depend on whether the involved work in a matter is copyrighted or not. *Id.* at 1185.

III ORRISON FOERSTER

District courts in Washington have also adhered to the *Dastar* holding.¹ In *CMSI, Inc. v. Pacific Cycle, Inc.*, the U.S. District Court for the Western District of Washington denied the plaintiff's reverse passing off claim where the plaintiff believed that the defendant copied scooters sold by the plaintiff and sold the seemingly identical scooters under the defendant's trademark. *CMSI, Inc. v. Pac. Cycle, Inc.*, No. C06-488 JLR, 2006 WL 2942794, at *1 (W.D. Wash. Sept. 15, 2006). The court denied the claim on the grounds that the plaintiff did not establish that "its role in the development of the scooters in dispute makes [the plaintiff] the scooters' 'origin.'" *Id.* at *3. The court highlighted that the Supreme Court in *Dastar* "declined to equate creation with 'origin' under the Lanham Act." *Id.* at *4. Therefore, being the first to "create, develop, or manufacture a product" is not sufficient for a party to claim that the product at issue originates with them. *Id.* at *5. The court again pointed to *Dastar* to demonstrate that placing a mark on a product does not necessarily "signal to consumers that it invented the scooter, developed the scooter, [or] homologated the scooter." *Id.* On the contrary, the mark indicates that the defendant "has produced (or commissioned the production of) the scooter, and stands behind it," and does not violate trademark law by doing so. *Id.* In this regard, a consumer does not experience confusion as a result of the added mark because "[a] consumer who buys a branded product does not automatically assume that the brand-name company is the same entity that came up with the idea for the product, or designed the product—and typically does not care whether it is." *Id.* at *4.

¹ Other district courts have also ruled against reverse passing off claims in a manner similar to *Dastar*. For example, see *FNA Grp., Inc. v. Jiangsu Longteng-Pengda Elec. Mech. Co.*, No. 218CV00812RFBVCF, 2020 WL 2840154, at *7 (D. Nev. May 31, 2020). There, however, the U.S. District Court for the District of Nevada relied on the language of Nevada Statute (NRS 598.0195(4)) rather than applying *Dastar* specifically.

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b. Application of *Dastar* to PARTY A's Potential Claim Against PARTY B

PARTY A likely does not have a viable reverse passing off claim against PARTY B. At present, whether PARTY A can satisfy the basic elements of a false designation of origin claim, as previously outlined, is less important. The primary question here, instead, is whether PARTY A can claim that it is the “origin” of the GOODS that were marked under the PARTY B trademark. The Supreme Court’s holding in *Dastar* explicitly states that “origin” refers to the “producer of the tangible goods that are offered for sale and not the author of any idea, concept, or communication embodied in those goods.” *Dastar*, 539 U.S. at 37. Though PARTY A could argue that the PRODUCTS that are proprietary to them *are* in fact tangible goods and not ideas or concepts, PARTY A would likely run into issues given that PARTY A licensed PARTY B to develop GOODS using PARTY A-owned PRODUCTS. Furthermore, assuming that PARTY B actually did develop the GOODS at issue, a court would likely determine that PARTY B is the producer of the GOODS and, consequently, is the origin of said GOODS. In this instance, PARTY A’s reverse passing off claim would likely not succeed because the designation of the origin of the GOODS at issue would not be false and consumers would not be confused regarding the origin of the GOODS at issue.

The anticipated outcome might be different if it is discovered that PARTY A developed the GOODS at issue. If, in this scenario, PARTY B purchased GOODS that were developed by PARTY A and then proceeded to use the PARTY B mark on those GOODS, PARTY A could have a viable reverse passing off claim against PARTY B.

Applicant Details

First Name **Brigid**
 Last Name **Fitzpatrick**
 Citizenship Status **U. S. Citizen**
 Email Address brigidf@umich.edu
 Address

Address

Street
45751 Bristol Circle
City
Novi
State/Territory
Michigan
Zip
48377
Country
United States

Contact Phone Number **2489461600**

Applicant Education

BA/BS From **University of Michigan-Ann Arbor**
 Date of BA/BS **December 2020**
 JD/LLB From **The University of Michigan Law School**
<http://www.law.umich.edu/currentstudents/careerservices>
 Date of JD/LLB **May 3, 2024**
 Class Rank **School does not rank**
 Law Review/Journal **Yes**
 Journal(s) **Michigan Journal of Law Reform**
 Moot Court Experience **No**

Bar Admission**Prior Judicial Experience**

Judicial Internships/
 Externships **No**

Post-graduate Judicial
Law Clerk **No**

Specialized Work Experience

Recommenders

Friedman, Richard
rdfrdman@umich.edu
734-647-1078

Carroll, Maureen
msclaw@umich.edu
734-764-0687

C.deBaca, Luis
ldebaca@umich.edu
734-647-4209

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Brigid Fitzpatrick
45751 Bristol Circle
Novi, MI 48377
(248) 946-1600
brigidf@umich.edu

May 26, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am a rising third-year student at the University of Michigan Law School and I am writing to apply for a clerkship in your chambers for the 2024-2025 term.

As someone committed to advocating for low-income and marginalized communities, I have sought out opportunities in law school to gain practical experience so that I can be an effective litigator. I have had the opportunity to work as a student attorney in the Michigan Innocence Clinic and help exonerate people who were wrongfully convicted. Through the clinic, I have gotten valuable experience writing memoranda and briefs, while also getting practical experience with the criminal judicial system. I was also selected to serve as an Articles Editor for the Michigan Journal of Law Reform, which has given me experience editing academic research. This summer I am working for the Great Lakes Environmental Law Center where I will have the opportunity to write memoranda and research legal and policy issues. I hope that clerking will give me further opportunities to hone my research and writing skills, as well as exposure to a wide range of legal issues.

I have attached my resume, law school transcript, and a writing sample for your review. Letters of recommendation from the following professors are also attached:

- Professor Richard Friedman: rdfdrman@umich.edu, 734-647-1078.
- Professor Maureen Carroll: msclaw@umich.edu, 734-764-0687.
- Professor Luis CdeBaca: ldebaca@umich.edu, 734-647-4209.

Thank you for your time and consideration.

Respectfully,

Brigid Fitzpatrick

Brigid Fitzpatrick

45751 Bristol Circle, Novi MI 48377

248-946-1600 • brigidf@umich.edu

EDUCATION

UNIVERSITY OF MICHIGAN LAW SCHOOL

Juris Doctor

Ann Arbor, MI

Expected May 2024

GPA: 3.952 (historically top 2%)

Activities: Journal of Law Reform, *Articles Editor*, Vol. 57 (Note in progress)

Honors: Certificate of Merit recipient for Evidence; Certificate of Merit recipient for Constitutional Law

UNIVERSITY OF MICHIGAN

Bachelor of Arts, with High Distinction, in Political Science and Spanish

Ann Arbor, MI

Graduated December 2020

Honors: University Honors (2017 - 2020)

James B. Angell Scholar (GPA-based award)

William J. Branston Freshman Prize (GPA-based award)

Activities: President, Residential College LGBT Forum

Undergraduate Research Assistant, Political Science Department

EXPERIENCE

GREAT LAKES ENVIRONMENTAL LAW CENTER

Summer Law Intern

Detroit, MI

May 2023 - August 2023

UNIVERSITY OF MICHIGAN LAW SCHOOL

Research Assistant for Professor Friedman

Ann Arbor, MI

January 2023 - March 2023

- Researched evidentiary issues such as admission of character evidence and impeachment

MICHIGAN INNOCENCE CLINIC

Student Attorney

Ann Arbor, MI

August 2022 - May 2023

- Investigated cases on behalf of inmates who are innocent of the crimes for which they have been convicted
- Wrote memos analyzing potential ineffective assistance and new evidence claims

FARMWORKER LEGAL SERVICES

Summer Law Intern

Kalamazoo, MI

May 2022 - August 2022

- Provided legal advice to clients on issues such as workers' compensation and breach of contract claims
- Wrote memos and briefs analyzing topics such as visa eligibility and employment discrimination claims
- Created educational materials regarding workers' tax obligations and rights

PANERA BREAD

Cashier

Novi, MI

September 2020 - August 2021

- Managed stress in a fast-paced environment; worked with team members to create positive environment

SIERRA CLUB

Political intern

Northville, MI

May 2020 - August 2020

- Educated voters in southeast Michigan via phone banking about key environmental issues

ADDITIONAL

Languages: Spanish (proficient)

Volunteer: Assistant ESL instructor at an Ann Arbor public middle school, campaign volunteer with the Michigan Democratic Party

Control No: E196342601

Issue Date: 05/17/2023

Page 1

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Fitzpatrick, Brigid
Student#: 62769701



Paul R. Johnson
University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Towards Program	Credit Grade
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Fall 2021 (August 30, 2021 To December 17, 2021)

LAW	510	004	Civil Procedure	Maureen Carroll	4.00	4.00	4.00	A-
LAW	520	003	Contracts	Albert Choi	4.00	4.00	4.00	A
LAW	540	001	Introduction to Constitutional Law	Daniel Halberstam	4.00	4.00	4.00	A+
LAW	593	013	Legal Practice Skills I	Timothy Pinto	2.00		2.00	S
LAW	598	013	Legal Pract:Writing & Analysis	Timothy Pinto	1.00		1.00	S

Term Total	GPA: 4.000	15.00	12.00	15.00
Cumulative Total	GPA: 4.000	12.00	15.00	

Winter 2022 (January 12, 2022 To May 05, 2022)

LAW	530	002	Criminal Law	Luis CdeBaca	4.00	4.00	4.00	A
LAW	580	001	Torts	Kyle Logue	4.00	4.00	4.00	A
LAW	594	013	Legal Practice Skills II	Margaret Hannon	2.00		2.00	S
LAW	660	001	Boundaries of Citizenship	Rebecca Scott	3.00	3.00	3.00	A

Term Total	GPA: 4.000	13.00	11.00	13.00
Cumulative Total	GPA: 4.000	23.00	28.00	

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Control No: E196342601

Issue Date: 05/17/2023

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The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Fitzpatrick, Brigid
Student#: 62769701



Paul R. Johnson
University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Towards Program	Grade
Fall 2022 (August 29, 2022 To December 16, 2022)								
LAW	630	001	International Law	Karima Bennoune	3.00	3.00	3.00	A-
LAW	669	001	Evidence	Richard Friedman	4.00	4.00	4.00	A+
LAW	976	001	Michigan Innocence Clinic	David Moran	4.00	4.00	4.00	A-
				Elizabeth Cole				
				Imran Syed				
LAW	977	001	Michigan Innocence Clinic Sem	David Moran	3.00	3.00	3.00	A-
				Elizabeth Cole				
				Imran Syed				
Term Total				GPA: 3.871	14.00	14.00	14.00	
Cumulative Total				GPA: 3.951		37.00	42.00	
Winter 2023 (January 11, 2023 To May 04, 2023)								
LAW	404	001	SexualOrien/GenderID & the Law	Maureen Carroll	2.00	2.00	2.00	A+
LAW	601	001	Administrative Law	Nina Mendelson	4.00	4.00	4.00	A
LAW	900	430	Research	Luis CdeBaca	1.00	1.00	1.00	S
LAW	976	001	Michigan Innocence Clinic	David Moran	4.00	4.00	4.00	A-
				Elizabeth Cole				
				Imran Syed				
LAW	977	001	Michigan Innocence Clinic Sem	David Moran	3.00	3.00	3.00	A
				Elizabeth Cole				
				Imran Syed				
Term Total				GPA: 3.953	14.00	13.00	14.00	
Cumulative Total				GPA: 3.952		50.00	56.00	

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The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Fitzpatrick, Brigid
Student#: 62769701



Paul R. Johnson
University Registrar

Course		Section	Load		Graded	Towards
Subject	Number	Number	Course Title	Instructor	Hours	Program
Fall 2023 (August 28, 2023 To December 15, 2023)						
Elections as of: 05/17/2023						
LAW	626	001	Immigrant Justice Lab	Melissa Borja	3.00	
LAW	677	001	Federal Courts	Gil Seinfeld	4.00	
LAW	686	001	Federal Indian Law	Kirsten Carlson	3.00	
LAW	741	001	Interdisc Prob Solv	Luis CdeBaca	3.00	
Slavery and the Built Environment: The Plantation						
Slavery/Built Env: Plantation						
LAW	803	001	UAdvocacy for Underdogs	Andrew Buchsbaum	2.00	

Remarks:

25-Jul-2019 MICH SPANISH PROFICIENCY

End of Transcript
Total Number of Pages 3

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University of Michigan Law School Grading System

Honor Points or Definitions

Through Winter Term 1993	Beginning Summer Term 1993
A+ 4.5	A+ 4.3
A 4.0	A 4.0
B+ 3.5	A- 3.7
B 3.0	B+ 3.3
C+ 2.5	B 3.0
C 2.0	B- 2.7
D+ 1.5	C+ 2.3
D 1.0	C 2.0
E 0	C- 1.7
	D+ 1.3
	D 1.0
	E 0

Other Grades:

- F Fail.
- H Top 15% of students in the Legal Practice courses for students who matriculated from Spring/Summer 1996 through Fall 2003. Top 20% of students in the Legal Practice courses for students who matriculated in Spring/Summer 2004 and thereafter. For students who matriculated from Spring/Summer 2005 through Fall 2015, "H" is not an option for LAW 592 Legal Practice Skills.
- I Incomplete.
- P Pass when student has elected the limited grade option.*
- PS Pass.
- S Pass when course is required to be graded on a limited grade basis or, beginning Summer 1993, when a student chooses to take a non-law course on a limited grade basis.* For SJD students who matriculated in Fall 2016 and thereafter, "S" represents satisfactory progress in the SJD program. (Grades not assigned for LAW 970 SJD Research prior to Fall 2016.)
- T Mandatory pass when student is transferring to U of M Law School.
- W Withdrew from course.
- Y Final grade has not been assigned.
- * A student who earns a grade equivalent to C or better is given a P or S, except that in clinical courses beginning in the Fall Term 1993 a student must earn a grade equivalent to a C+ or better to be given the S.

MACL Program: HP (High Pass), PS (Pass), LP (Low Pass), F (Fail)

Non-Law Courses: Grades for these courses are not factored into the grade point average of law students. Most programs have customary grades such as A, A-, B+, etc. The School of Business Administration, however, uses the following guides: EX (Excellent), GD (Good), PS (Pass), LP (Low Pass) and F (Fail).

Third Party Recipients

As a third party recipient of this transcript, you, your agents or employees are obligated by the Family Rights and Privacy Act of 1974 not to release this information to any other third party without the written consent of the student named on this Cumulative Grade Report and Academic Record.

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The work reported on the reverse side of this transcript reflects work undertaken for credit as a University of Michigan law student. If the student attended other schools or colleges at the University of Michigan, a separate transcript may be requested from the University of Michigan, Office of the Registrar, Ann Arbor, Michigan 48109-1382.

Any questions concerning this transcript should be addressed to:

Office of Student Records
University of Michigan Law School
625 South State Street
Ann Arbor, Michigan 48109-1215
(734) 763-6499

THE UNIVERSITY OF MICHIGAN
LAW SCHOOL
HUTCHINS HALL
ANN ARBOR, MICHIGAN 48109-1215

RICHARD D. FRIEDMAN
Alene and Allan F. Smith Professor of Law

TELEPHONE: (734) 647-1078
E-MAIL: rdfrdman@umich.edu

June 10, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I understand that Brigid Fitzpatrick is applying to you for a clerkship. I think very highly of her and am delighted to recommend her. She's terrific.

Brigid grew up in Novi, Michigan, right near Ann Arbor; her Dad has worked for GM for years. She went to this University for college, did very well, and continued here for law school.

Brigid has been a standout in our school; she has not had a single grade out of the A range. She was a student in my Evidence class in her third semester, and *the* outstanding student in the class. She was excellent in class sessions – consistently prepared and deeply engaged in the material. I always knew she would give a well-considered, on-point answer to my questions, and she asked good ones of her own. I gave three quizzes and a final that had both essays and a multiple-choice section. She did very well on the multiple choice, with the second highest score in the class, and had the best scores both on the quizzes and on the final-exam essays. Her totals were a little bit higher than those of a student in the class who has a GPA over 4.0 (and to whom I'd given an A+ in Civ Pro), and nobody else was very close. Bridget's superb performance in my class was in keeping with the record she has compiled throughout law school.

Indeed, she did so well in my Evidence course that afterwards I asked if she would do some research helping me to update a portion of the textbook. She readily agreed, and her work was as good and as helpful as I could have expected. So I then asked her to do some historical research, going back to the 17th and 18th centuries. She had no background in anything of the sort, but she is intellectually curious and she loves research and theory, so again she agreed and again her work was first-rate and very helpful.

Brigid was drawn to law school by the desire to advocate for low-income and historically marginalized communities, and she has spent a great deal of time in a wide variety of public-interest activities. But she is one of those rare students who loves all of law school, and as her historical work for me demonstrates, she enjoys engaging in any legal issue, no matter how unfamiliar it may be to her initially. And she is an excellent writer, with a talent for clear and nuanced explanation. She has made good progress on a law-journal Note on a topic on T visas for victims of human trafficking; because she has broad peripheral vision, she is including a comparative element. Brigid says she may be interested in academia down the line, and if she goes that route her intellectual firepower and curiosity and her writing ability make her a very good bet to succeed.

Brigid is personally pleasant, modest, and professional. I have enjoyed working with her, and I think any judge will as well. I am confident that, whatever direction Brigid chooses to take her career, she will make her mark. But first she will be a great law clerk.

If I can tell you anything more about Brigid, please do not hesitate to write or call. Meanwhile, thanks for your kind consideration.

Sincerely,

Richard D. Friedman

Richard Friedman - rdfrdman@umich.edu - 734-647-1078

UNIVERSITY OF MICHIGAN LAW SCHOOL
625 South State Street
Ann Arbor, Michigan 48109

May 26, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write in enthusiastic support of Brigid Fitzpatrick's application for a judicial clerkship.

I first had the pleasure of teaching Brigid in my Civil Procedure course during the Fall 2021 semester. Brigid's intelligence and thoughtfulness were immediately apparent. Over the course of the semester, their intellectual curiosity and enthusiasm for legal doctrine became apparent as well. Brigid's comments and questions greatly enriched our classroom discussions, and they were wonderfully judicious about their participation, saving their more esoteric questions for office hours. Brigid came to office hours frequently, and I enjoyed our conversations there immensely.

I was delighted to have the opportunity to work with Brigid again in my seminar on Sexual Orientation, Gender Identity, and the Law during the Winter 2023 semester. Brigid again made wonderful contributions to our class discussions, and it was clear that they had developed a deep and wide knowledge of the law over the two years since I'd last taught them. I was especially impressed with the way that Brigid referred back to other students' comments, not only absorbing and reflecting upon what others had said, but also building upon those earlier comments with sophistication and nuance.

The students in my seminar were required to complete a substantial writing project, and Brigid knocked theirs out of the park. Brigid chose a project, from a list of options that I provided, about a particular set of Michigan statutes and legislative proposals. In less capable hands, the final product could have been a dry list of items, presented without analysis or explanation. Instead, Brigid produced a well-organized, beautifully written, and wonderfully informative paper. It can be difficult for law students to balance the need to be precise with the need to be thorough, but Brigid struck that balance perfectly. Their efforts earned them an A+, which is a grade that I had not awarded to a student in that seminar in several years.

In sum, I have no doubt that Brigid will be an excellent clerk, and I support their application without hesitation or qualification. Please feel free to contact me if you have any questions about their candidacy.

Sincerely,

Maureen S. Carroll

Maureen Carroll - msclaw@umich.edu - 734-764-0687

MICHIGAN LAW
UNIVERSITY OF MICHIGAN
625 South State Street
Ann Arbor, Michigan 48109

Luis C.deBaca
Ambassador (ret.)
Professor from Practice

May 31, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to enthusiastically recommend Brigid Fitzpatrick for a judicial clerkship in your chambers. Brigid is a rising 3L at Michigan Law who was in my Criminal Law class. Brigid demonstrated the highest merit in assignments and on the final examination as well as in classroom interventions and interactions with counterparts. I am convinced Brigid will thrive in a judicial environment and will be a credit to your chambers; I enthusiastically recommend this talented young lawyer-to-be and encourage you to join those of us at Michigan Law who have been lucky enough to work with Brigid.

Brigid Fitzpatrick is a quiet superstar. If you are looking for clerks who combine a rapid-fire analytical legal mind with a reassuring manner that furthers collaboration, Brigid would be a perfect fit.

I have had the opportunity to observe Brigid Fitzpatrick's intellect and interpersonal skills over the last two years. Brigid of course has outstanding grades, at a law school with a very tough grading policy. Standing out in my class not only through an ability to understand not only the black letter of Criminal Law but also being able to confront how the justice system is propelled by or in conflict with the Purposes of Punishment and society's competing interests in security and personal freedom, Brigid was noteworthy for earning one of the few A grades that I assigned. Always prepared and thinking of next level questions, Brigid navigated the classroom and the often upsetting fact patterns of criminal law with an inquisitive spirit that neither backed away from tough discussions nor crossed the line into "gunning." I was frankly not surprised when I unmasked my blind grades to find Brigid exactly where I had expected: standing out amongst a very talented group of peers. But for this outstanding student such a grade is almost de rigueur – Brigid has earned the Certificate of Merit (for the highest grade) in both 1L and upper-level courses.

I don't want to lend the impression that Brigid is simply a grade machine. Passionate about service, Brigid has taken on tough practice areas ranging from farmworker legal services to exoneration/innocence work. Brigid harnesses Spanish skills and a keen legal intellect on behalf of these marginalized and often-ignored members of our society; it has been inspiring to see Brigid live the values (justice, access, restoration, balancing) that we discussed in CrimLaw – values that to many classmates appeared to be a frustrating detour from the rules as opposed to the driving force of criminal law as a manifestation of societal values and norms.

To that end, I am particularly enthusiastic about how Brigid approached the research project we worked together on this semester. When we first discussed working on a topic concerning service regimes for human trafficking victims I was glad to see that Brigid was willing to push to the next level on assessing how states respond to crimes of power. Brigid identified foreign jurisdictions to place in conversation with the US victim care scheme, especially how it treats undocumented immigrants who may have been held in contemporary forms of enslavement. By looking at the United Kingdom, Italy, and the Netherlands, Brigid was able to undertake a comparative law project in destination countries with similar economies, but different legal systems. As is the United States, these countries are all signatories to the United Nations anti-trafficking protocol, and Italy, Holland and the UK are governed by the EU anti-tracking trafficking Directive (despite Brexit, Britain has continued its own collaborative, focus with Europe on human trafficking law and policy).

Brigid's work on this project has been exemplary. The care with which Brigid has analyzed the logics and operation of the victim protection schemes in different legal and political contexts is impressive. Having set up much of the US victim-services approach during my time in government and having negotiated with the EU and the countries in question in my diplomatic role, I was struck by how Brigid as an arms-length legal researcher was able to quickly grasp the working of the regimes in a way that rang true given my personal involvement with the systems. The resulting recommendations will be useful to my policy and practice counterparts, and the article that Brigid will publish from this work will be an important contribution.

I'm sure you have gotten the sense by now how enthusiastic I am about what Brigid Fitzpatrick will bring to the practice of law. I am excited about this trajectory because I am convinced that Brigid will be a strong voice and a compassionate advocate for justice. Accordingly, and without reservation, I strongly urge you to join us in seeing the up-sides of this stellar candidate and to

Luis C.deBaca - ldebaca@umich.edu - 734-647-4209

select Brigid Fitzpatrick for a clerkship. If you have any further questions, please contact me at ldebaca@umich.edu or 703.470.1171.

Sincerely,

Luis C.deBaca

U.S. Ambassador (ret.)
Professor from Practice

Luis C.deBaca - ldebaca@umich.edu - 734-647-4209

Brigid Fitzpatrick

45751 Bristol Circle, Novi MI 48377
248-946-1600 • brigidf@umich.edu

This is an excerpt of a memo that I wrote during my summer internship at Farmworker Legal Services, which I was given permission to use. It is entirely my work and has not been edited by anyone other than myself. I was asked to analyze whether a client might be eligible for a U visa, for victims of crimes, or a T visa, for victims of human trafficking. I have redacted the client and employer's names and removed the "Facts" section to protect the client's confidentiality. I have also removed some sections of the analysis for length.

SUMMARY

This is an excerpt of a memo which analyzes whether a client who was originally from Mexico and who worked as a farmworker on an H-2A visa (hereafter referred to as “Client”) could be eligible for a U or a T visa, which are defined below. Client came to the U.S. to work on an orchard picking fruit. The hours he was expected to work were much longer than he expected, and his passport was confiscated soon after he arrived, preventing him from leaving. This memo concludes that, based on his experiences, Client may be able to demonstrate eligibility for either the U or the T visa.

DISCUSSION

Client is likely eligible for a U visa, but it would be more difficult for him to prove that he is eligible for a T visa. A U visa is a set aside for victims of certain qualifying crimes who have suffered physical or mental abuse and who have been or would be helpful to law enforcement. A T visa is for victims of severe trafficking in persons who are in the U.S. because of that trafficking, who have been or would be helpful to law enforcement, and who would suffer extreme hardship involving unusual or severe form if they were not allowed to stay in the United States. Because of the high bar imposed by the T visa’s extreme hardship requirement, Client is more likely to be able to prove that he is eligible for a U visa than a T visa, but we will likely want to do further facts investigation either way, and additional facts may change this analysis.

I. U-VISA ELIGIBILITY

a. Qualifying Criminal Activity

Fraud in Foreign Labor Contracting

One qualifying criminal activity under the U visa statute is fraud in foreign labor contracting. 8 CFR § 214.14(a)(9). 18 U.S.C. § 1351 defines fraud in foreign labor contracting as

(1) recruiting, soliciting, or hiring a person outside of the United States for purposes of employment in the United States (2) by means of materially false or fraudulent pretenses, representations or promises regarding that employment (3) knowingly and with intent to defraud. 18 U.S.C. § 1351; see also United States v. Bart, 888 F.3d 374, 379 (8th Cir. 2018).

Based on statements from clients and the job order given to us, we likely have a strong case that Employer committed fraud in foreign labor contracting. First, Employer clearly did hire Client from outside the United States for purposes of employment within the United States. Client is from a foreign country and learned about this job opportunity while in that foreign country. He was put in contact with Supervisor, who interviewed and hired Client as an H-2A worker.

Further, Employer's representations regarding that employment were materially false. On the job order, Employer stated that workers would work six hours per day, six days a week, and that they wouldn't be expected to work Sundays. In reality, Client was working twelve hours per day Monday through Saturday, and ten hours per day on Sundays. Although the job order stated that workers may be asked to work more hours than what was listed, it also stated that they would not be required to work additional time. However, it seems that Client and other workers were in fact pressured to work more hours than what was listed, with Client stating that workers once attempted to leave an hour early to do laundry and that the orchard owner made them continue working. Further, Client was paid less than he was told he would be. The job order states that he would be paid \$14.72 an hour or \$30 per box of apples picked. Client stated that he believed he was paid \$113 per day or \$20 per box of apples picked, and he said he would sometimes have to return part of this to his employer if they decided he was not productive enough. If we can prove this to be the case, we would likely be able to prove that Employer's

representations were materially false; however, we do not currently have paystubs that support this.

Finally, it seems likely that Employer made these representations knowingly and with intent to defraud, although we may want more evidence to reach this conclusion. As Supervisor was the one who initially interviewed Client and made false representations about the conditions of the work, and he was the one to clock the employees' hours, it seems very likely that he both intentionally and knowingly defrauded people in order to encourage them to work for Employer. Further, it's likely that he had a personal stake in doing so, as Client stated in his intake that some workers paid Supervisor when they arrived in the United States. Further, Client said in his intake that he complained to both Supervisor and the owner of the orchards that the terms of the contract were different from the hours that they were working, so it is almost certain that they were aware that the terms of the contract were a misrepresentation of the actual work being done.

Involuntary Servitude

Another qualifying criminal activity under the U visa statute is involuntary servitude. 8 CFR § 214.14(a)(9). In Kozminski, the Supreme Court defined involuntary servitude as a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process, and that involuntary servitude does not encompass psychological coercion. United States v. Kozminski, 487 U.S. 931 (1988).

The Trafficking Victims Protection Act of 2000 expanded this definition by defining involuntary servitude as “any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious physical harm or restraint; or the abuse or threatened abuse of the legal system.” In

Bradley, the First Circuit Court of Appeals agreed that “[I]f a person is compelled to labor against his will by any one of the means prohibited by the forced labor statute, such service is forced, even if he is paid or compensated for the work.” United States v. Bradley, 390 F.3d 145, 154 (1st Cir. 2004).

The threat of deportation may fall within the types of legal coercion referenced by the Supreme Court and by the Victims Protection Act of 2000 in their definitions of involuntary servitude. In Kozminski, the Supreme Court contemplated that, “threatening . . . an immigrant with deportation could constitute the threat of legal coercion that induces involuntary servitude.” Kozminski, 487 U.S. at 948; see also Kiwanuka v. Bakilana, 844 F. Supp. 2d 107 (D.C. Dist. 2012) (holding that where an employee’s passport was confiscated upon arrival and she was threatened with deportation if she stopped working, the employment conditions constituted involuntary servitude).

Here, Employer’s confiscation of Client’s passport and threats of deportation likely amount to abuse of the legal system constituting involuntary servitude. Soon after arriving in the United States, Employer asked all the workers for their passports and voting ID card. Initially, he said that the company just wanted to make copies and would return them, but Efrain later said that they would not be returned until the workers finished their contract and that they should not leave without permission. He told them that if they leave, police or immigration officials could arrest them. This is not a case of an employer merely warning employees of legal realities, as Employer created the conditions in which the workers could be detained or deported by taking their documentation. Further, Client did feel as though he was unable to leave as a result of these threats. He was afraid of being deported, and although he wanted to quit and asked for his passport multiple times, he felt that he could not leave because he did not have his passport.

Therefore, Client was threatened by abuse of the legal system which gave him no alternative but to continue working or risk deportation, amounting to involuntary servitude.

b. Physical or Mental Abuse

In addition to proving that a qualifying crime occurred, Client must be able to demonstrate that substantial physical or mental abuse was suffered as a result of being a victim of the qualifying crime. Courts will consider factors such as the nature of the injury suffered; the severity of the perpetrator's conduct; the severity of the harm suffered; the duration of the infliction of the harm; and the extent to which there is permanent or serious harm to the appearance, health, or physical or mental soundness of the victim. Although no single factor is considered a prerequisite, the existence of one or more factors also does not create a presumption of substantial physical or mental abuse. 8 C.F.R. § 214.214(b)(1).

Administrative agencies have quite a bit of discretion on this factor. In Garcia v. Audubon Cmty. Mgmt., LLC, the court held that the plaintiffs' showing that they suffered physical harm from lack of nourishment and shame from inability to purchase food was sufficient to demonstrate substantial physical or mental abuse. Garcia v. Audubon Cmty. Mgmt., LLC, No. 08-1291, 2008 U.S. Dist. LEXIS 31221, at *11-*12 (E.D. La. Apr. 15, 2008). However, in Bazaldua-Hernandez v. Rodriguez, the court affirmed the AAO's decision to deny the plaintiff's U visa application, because he could not prove that he suffered physical harm, his diagnosed PTSD and generalized anxiety were also related to other factors beyond his victimization, and his petition was made 10 years after his victimization. Bazaldua-Hernandez v. Rodriguez, No. EDCV 15-1383-JGB, 2016 U.S. Dist. LEXIS 149283, at *13 (C.D. Cal. Oct. 26, 2016).

Here, it will likely be difficult to prove that Client suffered substantial mental or physical abuse with the facts that we currently have. Client did state in his screening that he suffered mild depression, fear, and loneliness as a result of his victimization. However, this alone would probably not be enough to prove substantial mental abuse. He also states that he barely slept because of the long hours that they were forced to work, a direct result of both the fraud in foreign labor contracting and of the involuntary servitude. This could help to prove substantial physical abuse. Further, he said that they were often rushed taking lunch breaks and that they were only able to go grocery shopping when the supervisor allowed them to – if he was deprived of food as a result of either of these, that also could help prove physical abuse. It could be helpful that Client talked to family, friends, and his pastor about the situation, as they could submit letters describing any changes in Client’s mental state. If Client underwent a psychological evaluation that proved that he has ongoing mental health issues as a result of the abuse he suffered, that would help make a stronger case. However, without any documentation and because of the short duration of the infliction of the harm, it would likely be difficult to get this to the level of substantial physical and mental abuse.

II. T-VISA ELIGIBILITY

a. Labor Trafficking

In order to be eligible for a T visa, the applicant must have been the victim of a severe form of trafficking in persons. Under federal law, this is sex trafficking or labor trafficking. Labor trafficking is defined as when someone recruits, harbors, transports, provides, or obtains a person for labor or services through the use of force, fraud, or coercion for the purpose of involuntary servitude, peonage, debt bondage, or slavery.

An employer making false representations about employment conditions in order to hire someone from outside the U.S. and then threatening them with abuse of the legal system amounting to involuntary servitude so that they are unable to leave constitutes labor trafficking. In Ouloch v. Orina, the court describes the case of a plaintiff who accompanied her employer to the United States after signing a contract stating that she would make \$8.00 an hour and receive overtime pay and who was then only paid \$150 a month. Her passport was confiscated by the defendant and she was not allowed to leave the house unescorted, and the defendant threatened her well-being. The plaintiff was granted a T visa, as this was determined to be labor trafficking. Oluoch v. Orina, 101 F. Supp. 3d 325, 328 (S.D. N.Y. 2015). Similarly, in Lipenga v. Kambalame, a woman who was recruited to come to the U.S. with the promise of fair working conditions and compensation, whose passport was confiscated, and whose employer threatened to have her deported if she stopped working was granted a T visa. Lipenga v. Kambalame, 219 F. Supp. 3d 517, 523-524 (D. Md. 2016).

Here, Client was recruited and hired under materially false claims and was then threatened with deportation if he left. Employer stated that workers would work for six hours a day six days a week, and that they may be requested but not required to work longer hours. However, Client was instead expected to work 12 hours a day Monday through Saturday and 10 hours a day on Sundays. When workers attempted to leave early, in order to go to the laundromat, they were berated by the orchard owner and told to stay. Further, he was told that he would be paid \$14.72 per hour or \$30 per box of apples, and he was instead paid \$20 per box of apples and said that he received \$113 per day. As mentioned above, we would likely want to try to find paystubs or other evidence that supports Client's claims as to how much he was making.

Further, as in the Ouloch and Lipenga cases, Client's passport was confiscated shortly after arrival. He was told that his passport would not be returned until he finished the contract. He was also told on more than one occasion that he would be arrested by the police or immigration if he left. Client genuinely felt as though he was unable to leave because of these threats. He wanted to quit and return to his home country, and he asked for his passport to be returned to him multiple times, but his employer refused to return his passport. Without any identification, he was afraid to stop working or leave unaccompanied. Because the employer created conditions under which he could be detained or deported and Client felt as if he had no other choice but to continue working, this constitutes legal coercion which obtained Client's involuntary servitude.

b. Extreme Hardship

The applicant must also be able to demonstrate that they would face extreme hardship involving unusual and severe harm if they were removed from the United States. This is a higher standard than mere extreme hardship and cannot be based solely on economic detriment or disruption to social and economic opportunities. 8 C.F.R. § 214.11(i)(1). Factors that may be considered include age and personal circumstances; serious physical or mental illness; the nature and extent of the physical and psychological consequences of the trafficking; impact of loss of access to the U.S. criminal justice system for purposes relating to the crimes perpetrated against the applicant; a reasonable expectation that the applicant would be severely penalized for being a victim of trafficking in the country that they return to; the likelihood of revictimization and the ability or willingness of foreign authorities to protect the applicant; the likelihood of harm that the trafficker would cause the applicant in the foreign country; and the likelihood that the applicant's safety would be threatened by the existence of civil unrest or armed conflict. Suzanne

B. Seltzer et. al., T Visa Manual: Identification and Legal Advocacy for Trafficking Survivors A-12 (4th ed. 2018). These considerations don't need to be connected to the trafficking; for example, if the applicant has developed a medical condition that can be better treated in the U.S., that would be a valid example of extreme hardship. Id. Further, while economic need is not relevant, if economic issues may lead an applicant to being re-trafficked, that is a relevant factor. Id.

Here, it is unlikely that we have sufficient evidence to demonstrate extreme hardship involving unusual and severe harm. We may be able to make the case that returning to his country of origin would put Client in an economic position that would leave him likely to be subject to labor trafficking again. However, this on its own is unlikely to be enough. If there were evidence that Client has a physical or psychological condition in need of treatment in the U.S. or that Client is at risk of facing retaliation in his country of origin, that would significantly contribute to the likelihood of proving extreme hardship.

CONCLUSION

Client may be eligible for a U visa, but with the information that we currently have, he is unlikely to be eligible for a T visa. To obtain a U visa, it seems likely that he could prove he suffered at least one eligible crime – fraud in foreign labor contracting or involuntary servitude. He may also be able to prove physical or mental abuse, although we may want to gather more documentation or statements from friends and family in his home country. To obtain a T visa, he can likely prove that he was a victim of labor trafficking, but with the evidence that we currently have, it would be difficult for him to prove that he would suffer extreme hardship if he was removed from the United States.

Applicant Details

First Name	Eliana
Last Name	Fleischer
Citizenship Status	U. S. Citizen
Email Address	efleischer@uchicago.edu
Address	<div> <div>Address</div> <div> <div>Street</div> <div>5454 S Shore Dr</div> <div>City</div> <div>Chicago</div> <div>State/Territory</div> <div>Illinois</div> <div>Zip</div> <div>60615</div> <div>Country</div> <div>United States</div> </div> </div>
Contact Phone Number	8479898579

Applicant Education

BA/BS From	University of Richmond
Date of BA/BS	June 2020
JD/LLB From	The University of Chicago Law School
	https://www.law.uchicago.edu/
Date of JD/LLB	June 1, 2024
Class Rank	School does not rank
Law Review/Journal	Yes
Journal(s)	The University of Chicago Law Review
Moot Court Experience	No

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	No
--------------------------------------	----

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Davidson, Adam
davidsona@uchicago.edu

Zunkel, Erica
ezunkel@uchicago.edu
773-702-9494

Rappaport, John
jrappaport@uchicago.edu
773-834-7194

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Dear Honorable Judge Walker,

I am enthusiastically submitting my application for a clerkship position in your chambers. I am an intellectually curious and hardworking rising 3L at the University of Chicago Law School. I believe I would make a strong addition to your team.

My determination to use the law to advance the public interest drives me to look for innovative solutions to difficult problems. In college, I wrote my honors thesis on police accountability, which surveyed Fourth Amendment law and qualified immunity to understand why the police are so often legally untouchable. I continued to study this subject in law school and wrote my Law Review comment proposing a precedent-bound mechanism for widening the scope of liability under the qualified immunity doctrine. I also pursued this work outside of the classroom: I have volunteered at the Torture Inquiry and Relief Commission and worked at the MacArthur Justice Center and Loevy & Loevy. In each role, I advanced the mission of the organization in every way I could, including poring over discovery documents, reading old transcripts, and writing research memos to inform motions.

I am adept at legal research in a condensed time frame to produce work applying that law on behalf of a client's needs. During my second internship last summer at the Public Defender Service in Washington, DC, I was entrusted with writing the first draft of a motion for severance in a far-reaching conspiracy case that was unique for that district. I familiarized myself with the evidence, researched conspiracy law in the district, and completed a working motion to sever defendants and charges. I also focused on displaying our client's individuality to show that he was not simply one of many young Black defendants, but his own person entitled to his own trial.

Additionally, I excel at working in a team environment to accomplish a common goal. In the Federal Criminal Justice Clinic, I worked with a team of my peers and social work students to craft and write a motion for compassionate release, complete with our client's life story, an accounting of the sexual abuse scandal in the prison where she was incarcerated, and a mental health treatment plan for her release. Our debate over legal arguments and collaboration in editing each other's writing paid off: the prosecutor chose not to oppose our motion, and the judge released our client three years early.

It would be a privilege to join your chambers for the 2024 term. I am delighted at the prospect of returning to Virginia. I know that my diligence in research, precise writing, and dedication to the law as a mechanism for justice can help advance your important work. Thank you for your time and consideration.

Sincerely,
Eliana Fleischer

Eliana Fleischer

5454 S Shore Dr, Chicago, IL 60615 | (847) 989-8579 | efleischer@uchicago.edu

EDUCATION

The University of Chicago Law School, Chicago, Illinois, Candidate for J.D., June 2024

- Journal:* THE UNIVERSITY OF CHICAGO LAW REVIEW, Staff Member
- Activities:* American Constitution Society, Co-Director of Programming 2022-2023; Defenders; Jewish Law Students Association; Latinx Law Students Association; Outlaw
- Awards:* Allen M. Singer Scholarship; Norval Morris Public Interest Fellowship; Equal Justice America Fellowship
- Publications:* *Stating the Obvious: Departmental Policies as Clearly Established Law*, 90 U. CHI. L. REV. (forthcoming 2023); *Judging the Referee: How Judicial Standards of Review Can Improve Soccer's Video Assistant Referee System*, U. CHI. L. REV. ONLINE (Nov. 23, 2022)

University of Richmond, Richmond, Virginia, B.A. in Leadership Studies and Political Science, May 2020

- Honors:* Boatwright Scholar (Full tuition merit award); Magna Cum Laude; Dean's List; James MacGregor Burns Award (Highest student honor in Leadership Studies); Westhampton College Distinguished Leadership Award; Frederic M. Jablin Award for Undergraduate Research; Omicron Delta Kappa (National Leadership Honor Society); Pi Sigma Alpha (National Political Science Honor Society)
- Thesis:* *A License to Kill: The Institutional Failure of the Legal System to Hold Police Accountable*
- Abroad:* Emmanuel College, University of Cambridge, Cambridge, England, Summer 2018

EXPERIENCE

Loevy & Loevy, Chicago, IL, *Summer Associate*, May 2023 – August 2023

- Conduct legal research and write substantive motions
- Review and catalog evidence from criminal convictions for use in a wrongful conviction lawsuit

Federal Criminal Justice Clinic, Chicago, IL, *Clinical Student*, September 2022 – May 2023

- Spearheaded and composed the narrative section of a successful compassionate release motion for a client who was sexually abused in prison
- Reviewed and catalogued criminal trial transcripts, prison discovery documents, media reports, and congressional testimony for use in the compassionate release motion
- Drafted public landing page and developed strategic plan for publicizing the Clinic's groundbreaking Freedom Denied report detailing the pretrial jailing crisis in the federal judiciary

The Public Defender Service for the District of Columbia, Washington, DC, *Intern*, August – September 2022

- Conducted legal research to show prosecutorial bad faith in charging decisions
- Analyzed discovery material and strategized legal arguments for a case with multiple defendants
- Assisted in drafting a multi-part severance motion with comprehensive legal and factual arguments

Roderick and Solange MacArthur Justice Center, Chicago, Illinois, *Intern*, June – August 2022

- Assisted in drafting complaints and pre-trial motions for prisoner's rights, wrongful conviction, and police accountability cases
- Conducted research on legal standards for police activity and evidentiary standards to supplement motions and prepare for trial
- Reviewed opposing parties' discovery production for documents most salient to proving plaintiffs' claims

State of Illinois Torture Inquiry and Relief Commission, Chicago, Illinois, *Volunteer*, June 2020 – June 2022

- Compiled case files of Cook County court transcripts for review by the Commission to investigate allegations of torture by the Chicago Police Department

Raise the Floor Alliance, Chicago, Illinois, *Paralegal*, July 2020 – July 2021

- Conducted legal research for class action workplace discrimination cases, drafted demand letters to employers, and filed documents with state and federal court entities
- Served as primary point of contact with English and Spanish-speaking clients



Name: Eliana R Fleischer
Student ID: 12329136

University of Chicago Law School

Academic Program History

Program: Law School
Start Quarter: Autumn 2021
Current Status: Active in Program
J.D. in Law

External Education

University of Richmond
Richmond, Virginia
Bachelor of Arts 2020

Beginning of Law School Record

		Autumn 2021		
Course	Description	Attempted	Earned	Grade
LAWS 30101	Elements of the Law Lior Strahilevitz	3	3	176
LAWS 30211	Civil Procedure Emily Buss	4	4	182
LAWS 30611	Torts Adam Chilton	4	4	177
LAWS 30711	Legal Research and Writing Alison Gocke	1	1	180

		Winter 2022		
Course	Description	Attempted	Earned	Grade
LAWS 30311	Criminal Law Jonathan Masur	4	4	177
LAWS 30411	Property Aziz Huq	4	4	182
LAWS 30511	Contracts Douglas Baird	4	4	178
LAWS 30711	Legal Research and Writing Alison Gocke	1	1	180

		Spring 2022		
Course	Description	Attempted	Earned	Grade
LAWS 30712	Legal Research, Writing, and Advocacy Alison Gocke	2	2	183
LAWS 30713	Transactional Lawyering Joan Neal	3	3	176
LAWS 43273	Emotions, Reason, and Law Martha C Nussbaum	3	3	179
LAWS 44201	Legislation and Statutory Interpretation Ryan Doerfler	3	3	177
LAWS 47201	Criminal Procedure I: The Investigative Process John Rappaport	3	3	179

Summer 2022

Honors/Awards
The University of Chicago Law Review, Staff Member 2022-23

Autumn 2022

Course	Description	Attempted	Earned	Grade
LAWS 46101	Administrative Law Thomas Ginsburg	3	3	180
LAWS 46501	Federal Criminal Law Sharon Fairley	3	3	177
LAWS 50311	U.S. Supreme Court: Theory and Practice Meets Writing Project Requirement	3	3	182
Designation:				
Sarah Konsky Michael Scodro				
LAWS 90221	Federal Criminal Justice Clinic Erica Zunkel Alison Siegler Judith Miller	1	0	
LAWS 94110	The University of Chicago Law Review Anthony Casey	1	1	P

Winter 2023

Course	Description	Attempted	Earned	Grade
LAWS 40101	Constitutional Law I: Governmental Structure David A Strauss	3	3	177
LAWS 48214	Race and the Law Adam Davidson	3	3	182
LAWS 53365	LGBT Law Camilla Taylor	3	0	
LAWS 90221	Federal Criminal Justice Clinic Erica Zunkel Alison Siegler Judith Miller	1	0	
LAWS 94110	The University of Chicago Law Review Anthony Casey	1	1	P



Name: Eliana R Fleischer
Student ID: 12329136

University of Chicago Law School

		Spring 2023			
Course	Description	Attempted	Earned	Grade	
LAWS 40301	Constitutional Law III: Equal Protection and Substantive Due Process Aziz Huq	3	3	182	
LAWS 41601	Evidence John Rappaport	3	3	181	
LAWS 47301	Criminal Procedure II: From Bail to Jail Alison Siegler	3	3	177	
LAWS 90221	Federal Criminal Justice Clinic Erica Zunkel Alison Siegler Judith Miller	1	0		
LAWS 94110	The University of Chicago Law Review Meets Substantial Research Paper Requirement	1	1	P	
Req Designation:	Anthony Casey				

End of University of Chicago Law School

Adam Davidson
Assistant Professor of Law
The University of Chicago Law School
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June 09, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It is my pleasure to recommend Eliana Fleischer for a clerkship in your chambers. I have gotten to know Eliana in two contexts. I advised her comment, which will be published in the University of Chicago Law Review, and I taught her in Race and the Law. In both contexts, Eliana displayed all of the makings of an excellent law clerk.

Eliana is a rigorous, creative, and practical legal thinker. All of these traits were on display as she wrote her comment, and getting the opportunity to watch her develop her comment was one of the delights of my academic year. Eliana's comment is about how police policies should be considered when evaluating qualified immunity's clearly established law prong. On one view, they shouldn't be, as courts generally think of clearly established law as limited to binding precedent. But as Eliana notes, courts around the country, including the Supreme Court, have noted, and at times seemingly relied on, the existence of a police policy when finding that the law was clearly established.

Eliana's ability to master this area of law generally was impressive, but not nearly as impressive as her ability to find a doctrinally grounded throughline in a series of cases that, from an initial reading, seemed to point in every possible direction. Eliana's solution was, in a word, elegant. She noted that while the Court had created an "obviousness" exception to the clearly established law analysis, it had been criticized for being too amorphous to be useful. Here, Eliana argues, police policies might play a role. If a constitutional violation also violated departmental policy, that could be a sign of its obviousness. After all, one reason that courts might not have clearly established law on the "obvious" cases is because most officers do not flagrantly violate their departmental policies.

Eliana's journey to this solution involved not only mastering a complex body of cases, but also navigating the ever-growing scholarly literature on qualified immunity. She attempted to account for not only how the courts have said qualified immunity operates, but also how scholars have found that the doctrine operates in practice. For example, the courts have regularly said that qualified immunity is, in part, about providing notice to government actors, but scholars have found that police are rarely taught the body of clearly established law in their jurisdiction. By contrast, police will almost always have actual notice of their department policies.

But beyond the substance of her work, Eliana has been a joy to interact with. She internalizes feedback well, but she also knows how to push back when appropriate. She is thoughtful to a fault. Her questions were often not only about finding what she thought was the best answer, but also attempting to find the answer most likely to help the most people. This ability and willingness to develop both her own view of the ideal position and to think strategically about what position might gain adherents from different audiences is a skill I have found many students struggle with. That is especially so for students like Eliana who have strong views because they are dedicated to improving the world through public interest work.

I believe that I would have enjoyed having Eliana as a co-clerk, and the combination of her acumen and her personality makes me recommend Eliana enthusiastically and unabashedly.

Sincerely,

Adam Davidson

Adam Davidson - davidsona@uchicago.edu



THE UNIVERSITY OF CHICAGO
THE LAW SCHOOL
Federal Criminal Justice Clinic

Erica Zunkel
Clinical Professor of Law
Associate Director, Federal Criminal Justice Clinic

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June 12, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Clerkship Recommendation for Eliana Fleischer

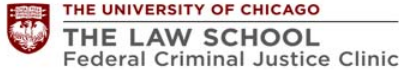
Dear Judge Walker:

I strongly recommend Eliana Fleischer for a clerkship in your chambers. Eliana's diligence, strong research and writing skills, and the admirable level of professionalism with which she approaches all of her endeavors will make her a terrific clerk. Beyond academics, Eliana is wonderful to work with—she is earnest, kind, and devoted to the cause of lifting up all people.

I had the privilege of working closely with Eliana this year in my Federal Criminal Justice Clinic, which was the first legal clinic in the country to focus on representing indigent clients charged with federal felonies. Eliana's work has been excellent across the board. Eliana has shown a keen eye for fact development, legal research and writing, and collaborative legal work. One of Eliana's most impressive attributes is her commitment to becoming the best lawyer she can be. She routinely asks probing, interesting, and insightful questions.

Because of the demands of my Clinic's cases, we have a preference for third-year students who have more time in their schedules and who have taken advanced criminal law classes. Working in the Clinic during his second year required Eliana to juggle a full academic caseload and her other extracurricular activities, including Law Review membership, which is very demanding. Eliana flourished, and over the course of the year I asked her to do work that would ordinarily be entrusted only to our most skilled third-year students.

Eliana primary project was drafting a federal compassionate release motion on behalf of a survivor of sexual abuse at the Bureau of Prisons' (BOP) FCI Dublin women's prison. The underlying facts are horrific—our client suffered significant sexual abuse at the hands of several different correctional officers. I tasked Eliana with writing the section of our motion that outlined our client's personal experiences as well as an overview of the sexual abuse scandal at FCI Dublin and throughout the BOP. I first asked Eliana to research and organize media reports about what happened at FCI Dublin, congressional reports about sexual abuse of women in federal prisons, and BOP and court documents relating to our client's case. This involved an incredible amount of time, patience, and attention to detail, which was well suited to Eliana's strengths. She meticulously organized the information so that the entire team could make use of



it. After she completed her fact-gathering and organization, Eliana drafted the facts section of the motion. We went through several drafts, with Eliana continually refining and honing her work.

Eliana's finished product was simply outstanding. It was comprehensive, compelling, and humanizing, and it set the stage for the legal analysis that followed. Eliana was also committed to seeing her work through. She proactively reached out to me to ask how she could help to ensure that the motion was in excellent shape for filing. In addition, while working on the motion, Eliana demonstrated impeccable judgment and never hesitated to ask questions when she needed clarifying information— both great qualities for any future clerk and litigator. Eliana's work had an incredible impact: our motion was recently granted, and our client was released in late May, making it one of the first compassionate release grants for survivors of sexual abuse at Dublin in the country.

The hard work and professionalism that Eliana demonstrated on her Clinic case translated into her other Clinic activities. She was always prepared for team meetings and our Clinic seminar. She responded in a very timely fashion to emails from myself and other members of the legal team. She also worked very well with her student colleagues and other clinic supervisors.

In addition to possessing impressive legal skills, Eliana is a student who is deeply committed to advancing social justice. Eliana came to law school to be an advocate for people ensnared in the criminal justice system and for people whose rights have been violated. Last summer, she worked at the MacArthur Justice Center on police accountability cases, and at the D.C. Public Defender's Office defending indigent individuals charged with crimes. At the Law School, Eliana is involved in a number of different activities and organizations, including the American Constitution Society for which she is Co-Director of Programming, the Law Review, and the Defenders student group.

The same qualities Eliana has shown during her time in my Clinic—professionalism, hard work, integrity, and conscientiousness—are attributes that will make her a wonderful clerk, especially when combined with her strong research and writing skills. If you would like to discuss Eliana's qualifications further, please do not hesitate to call me at (510) 332-1490.

Sincerely,

A handwritten signature in blue ink, appearing to read "EZunkel".

Erica K. Zunkel
Clinical Professor of Law
Associate Director, Federal Criminal Justice

John Rappaport
Professor of Law
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June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

Eliana Fleischer, a member of the University of Chicago Law School Class of 2024, is applying for a clerkship in your chambers. It's my pleasure to submit this letter of recommendation on her behalf. Eliana has been a joy to teach. She's smart, curious, warm, and public-minded. She's a major presence in the Law School community, active in multiple student groups including the University of Chicago Law Review. She's mature and grounded, too, having worked for a year as a paralegal before matriculating at Chicago. I recommend you give her a serious look.

I made Eliana's acquaintance when she enrolled in my Criminal Procedure course in the Spring Quarter of her 1L year. Her engagement was evident from her fine performance on cold calls and her probing questions during office hours. She did well on the course exam, earning a 179—a high B+ on Chicago's rigorous curve. Subjectively, she struck me as even stronger than this. I had Eliana in class again this past quarter for Evidence. Again she stood out among her peers for her curiosity and engagement with the material. Teaching would be a pure joy if I had rooms full of Elianas every quarter. And this time, her exam performance better reflected my observations, netting her a 181—a solid A—in the class.

Eliana's record at Chicago is strong, if a little varied. Her ceiling is high, as reflected by the 182s—solid As—she earned in core classes like Civil Procedure and Property as well as more interdisciplinary offerings like Race and the Law. Particularly notable is Eliana's 183 in the Spring Quarter of her legal writing course, which would have put her near the top of her section in appellate brief-writing. It was likely these writing skills that landed her a spot on the Law School's flagship law review.

Eliana's many other activities reflect her diverse background and interests. She serves on the board of the American Constitution Society and participates as well in Defenders (a group for students interested in public defense work), the Jewish Law Students Association, the Latinx Law Students Association, and Outlaw. Much of my interaction with Eliana outside the classroom has concerned her laser-focused interest in public service. As you know, the pull of "BigLaw" can be strong, and many students who enter law school intending to do public interest work migrate to corporate law firms in the end. Eliana is serious about sticking to what she came here to do. Her 1L summer, which she split between the MacArthur Justice Center and the Public Defender Service for the District of Columbia, previews the types of work she'll likely pursue after clerking.

Eliana attributes her commitments largely to her religious upbringing. She recalls her rabbi's High Holiday sermons reminding the congregation that Jews, once enslaved, are now free—and with that freedom comes the responsibility to help those who are not yet free. Influential as well was Eliana's bilingual and bicultural upbringing. Her paternal grandparents immigrated to the United States from Argentina. Eliana's childhood memories play in a mixture of Spanish and English, as her large and tight-knit family gathered for holiday festivities at her grandparents' house.

To top things off, Eliana is a pleasure interpersonally. Her smile warms the room. She radiates a positivity that gives one hope for the future during this difficult political era. I'm confident that all who work with her will come to love her. I hope you'll take the opportunity to meet her and see for yourself.

Sincerely,

John Rappaport

John Rappaport - jrappaport@uchicago.edu - 773-834-7194

Eliana Fleischer

5454 S Shore Dr, Chicago, IL 60615 | (847) 989-8579 | efleischer@uchicago.edu

This writing sample is an abridged version of my comment as written for the University of Chicago Law Review. It represents my original idea and my writing. It has received feedback from a faculty advisor and suggested edits from members of the Law Review. A complete version will be published in the University of Chicago Law Review in September 2023.

Stating the Obvious: Departmental Policies as Clearly Established Law

Eliana Fleischer

INTRODUCTION

State and federal government officers carry weapons and are authorized to use force—including deadly force¹—with few safeguards to prevent mistakes and bad actions. When a government officer violates an individual's rights, the individual can sue for damages.² While this does not undo the harm the individual experienced, a successful claim can provide a monetary remedy for the harm and hold the officer accountable. However, there are significant legal obstacles to successfully bringing a case against a government officer. One of the most contentious barriers to accountability is qualified immunity.

Qualified immunity is an affirmative defense that was created to protect state and federal government officials from meritless or harassing lawsuits for performing their jobs.³ Before a court will hear the merits of a case, it must first determine that the official is not immune from liability. Even if an officer violates a person's constitutional rights, the officer is entitled to qualified immunity when the violated right was not "clearly established."⁴

Officers undergo training and are guided by departmental policies that aim to instruct officers about proper conduct and prevent rights violations. These policies operate prospectively, and while they cannot reasonably prepare officers for every possible circumstance, they provide a rough code of conduct to which officers should adhere. But what happens when officers do not abide by their own department's policies?

For individuals, such as the family of Brian Drummond, this question is personal. Drummond had a history of mental illness, and one night he ran out of his medication.⁵ His neighbor called the police to prevent him from injuring himself.⁶ Drummond was unarmed and hallucinating, and the officers called an ambulance to transport him to get medical care.⁷ But instead of waiting for the ambulance, the officers decided to take him into custody: they knocked him to the ground and cuffed his arms behind his back.⁸ Although Drummond was not resisting, two officers knelt on his back and neck.⁹ Drummond complained to the officers that he could not breathe. One witness said that Drummond was obviously having trouble breathing, but the officers were laughing.¹⁰ An additional officer arrived, and they bound Drummond's ankles, too.¹¹ At this point, about twenty minutes after they first restrained him, Drummond lost consciousness.¹² As a result of the officers' actions, Drummond fell into a permanent vegetative state.¹³

¹ See, e.g., *Tennessee v. Garner*, 471 U.S. 1, 3 (1985) (holding that deadly force may be used when "it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others").

² See 42 U.S.C. § 1983; see also *Monroe v. Pape*, 365 U.S. 167, 187 (1961) (holding that § 1983 creates a cause of action to enforce constitutional rights against state government officials).

³ *Anderson v. Creighton*, 483 U.S. 635, 638–39 (1987).

⁴ *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

⁵ *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1054 (9th Cir. 2003).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Drummond*, 343 F.3d at 1054–55.

¹¹ *Id.* at 1055.

¹² *Id.*

¹³ *Id.*

The officers should have known that their actions violated Drummond's rights.¹⁴ Their own police department specifically trained them not to kneel on a person's back or neck for restraint, as doing so can be deadly.¹⁵ Additionally, the risks of such actions were reported in a local newspaper less than two months earlier.¹⁶ Despite clear evidence that the officers should have known not to restrain Drummond in the dangerous way they did, the district court judge granted the officers qualified immunity and dismissed the case.¹⁷

When an officer asserts qualified immunity, the plaintiff has to overcome the defendant's immunity defense before the case is assessed on the merits.¹⁸ There is a two-part test for determining whether qualified immunity applies: "Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct."¹⁹ Courts have the discretion to decide either prong of the test first.²⁰

The second part of the qualified immunity test—the clearly established prong—is the more ambiguous of the two.²¹ Its inclusion in the qualified immunity test is intended to protect officials from liability unless they were on notice that their conduct could clearly violate constitutional rights.²² Although the Court has been clear that general constitutional principles cannot clearly establish law for the purpose of the test²³—a higher level of factual specificity is required—it has not explicitly determined what makes law "clearly established." As a result, lower courts have been left to model their clearly-established-law analysis after the Supreme Court's sporadic and sometimes conflicting qualified immunity jurisprudence.²⁴

There is substantial uncertainty about the role that departmental policies can have, if any, in the clearly established law analysis. The policies at issue in this Comment are any

¹⁴ *Id.* at 1061 ("Any reasonable officer should have known that such conduct constituted the use of excessive force." (emphasis in original)).

¹⁵ *Drummond*, 343 F.3d at 1061–62 ("[T]he officers received training from their own police department explaining specifically that 'when one or more [officers] are kneeling on a subject's back or neck to restrain him, compression asphyxia can result [t]hat may be a precipitating factor in causing death.'" (second and third alterations in original) (emphasis in original) (quotation marks omitted)).

¹⁶ *Id.* at 1061.

¹⁷ See *Drummond ex rel. Drummond v. City of Anaheim*, 8:00-cv-00243, Dkt. No. 102 (C.D. Cal. Jan. 17, 2002). The dismissal on the basis of qualified immunity was overturned at the Ninth Circuit on the grounds that the department's policies and training program provided the officers "'fair warning' that the force they used was constitutionally excessive even absent a Ninth Circuit case presenting the same set of facts." *Drummond*, 343 F.3d at 1061. On remand, the jury rendered a verdict for the officers and dismissed the case. *Drummond ex rel. Drummond v. City of Anaheim*, 8:00-cv-00243, Dkt. No. 393 (C.D. Cal. May 14, 2009).

¹⁸ See Kenneth Duvall, *Burdens of Proof and Qualified Immunity*, 37 S. ILL. U. L.J. 135, 145 (2012) (finding a circuit split on the burden of proof for qualified immunity, with five circuits placing the burden on the defendant, five circuits placing the burden on the plaintiff, and two circuits splitting the burden of persuasion by step); Aisha Green, *Comparing Dadd v. Anoka County with Corbitt v. Vickers: Why Defendants Should Bear the Burden of Establishing Qualified Immunity in a Motion to Dismiss*, 70 AM. U. L. REV. 2091, 2108–13 (2021) (describing a circuit split between the Eighth Circuit and the Eleventh Circuit with regard to allocating the burden of establishing qualified immunity).

¹⁹ *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (citing *Harlow*, 457 U.S. at 818).

²⁰ *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

²¹ Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 Touro L. REV. 633, 653 (2013) ("[T]he more difficult task is figuring out what is required to make the law 'clearly established.'").

²² *Creighton*, 483 U.S. at 639–40 (explaining that officials must reasonably be able to "'anticipate when their conduct may give rise to liability for damages' . . . in the light of pre-existing law the unlawfulness must be apparent") (quoting *Davis v. Scherer*, 468 U.S. 183, 195 (1984)).

²³ *Id.* at 639 (explaining that, for example, the Due Process Clause does not serve to clearly establish the right to due process because "if the test of 'clearly established law' were to be applied at this level of generality . . . [qualified immunity] would be transformed from a guarantee of immunity into a rule of pleading").

²⁴ Blum et al., *supra* note 21, at 653 (explaining that "[o]ne problem with negotiating the clearly-established-law terrain" is the Court's "mixed signals as to what is sufficient to give officials notice that certain conduct is unconstitutional").

rules or training materials that provide guidance to officers, as “police policies and training have [long] been understood as a means of limiting officer discretion.”²⁵

This Comment proposes that courts consider these nonbinding mechanisms for limiting discretion as clearly established law for the purpose of qualified immunity.²⁶ Departmental policies offer a prospective, informed assessment of how reasonable officers should act. For this reason, courts should consult them as indicators of what conduct is clearly established to be wrongful.

* * * Part II describes the current consideration of departmental policies in the clearly established law analysis. It provides an overview of the conflicting messages about the use of policies from the Supreme Court and details how lower courts apply policies when evaluating qualified immunity. Additionally, it describes the legal fiction inherent in the clearly established law inquiry and posits that some lower courts cite policies as a way to address this legal fiction. Part III offers a solution that incorporates policies into the current doctrinal framework—without requiring a change in precedent—as an objective measure for determining when an officer’s violation of a person’s rights was obvious. Officers who obviously violate rights and should have known better are not entitled to qualified immunity.²⁷ Ultimately, this Comment explains how departmental policies can be informative in resolving close cases where “obviousness” may be up for debate, which also functions to realign the doctrine with its stated purpose.

I. ORIGINS AND JUSTIFICATIONS OF QUALIFIED IMMUNITY

* * *

II. CURRENT STATE OF THE LAW

While the purpose of the clearly established law prong is clear, the application of this test is unsettled.²⁸ The test asks whether the constitutional right was clearly established at the time of the conduct, but the Supreme Court has never definitively determined what counts as clearly established law.²⁹ The Court has given conflicting information concerning the use of policies in this analysis; it has both disavowed the use of policies as clearly established law and used policies to support its holdings.³⁰ Because of this contradictory treatment at the Supreme Court, there is no consensus in lower courts about how to consider policies in the qualified immunity analysis.³¹ Part II.A discusses the Supreme Court’s treatment of policies as clearly established law, and Part II.B provides an overview of whether and how district and appellate courts include policies in their qualified immunity analyses. This Part describes the outer bounds of where policies can fit into the existing

²⁵ Ingrid V. Eagly & Joanna C. Schwartz, *Lexipol’s Fight Against Police Reform*, 97 IND. L.J. 1, 4 (2022).

²⁶ This Comment’s definition of policies does not include rules or regulations that create binding obligations or carry the force of law, such as statutes. Additionally, this Comment solely concerns individual officer liability under § 1983 or *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). An in-depth analysis of the effect that considering policies in the qualified immunity analysis could have on claims against local governments under *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978), is outside the scope of this Comment.

²⁷ *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

²⁸ See Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court*, 63 WASH. & LEE L. REV. 271, 290 (2006) (“Applying standards to a particular set of facts, however, may be as difficult or important as articulating the standard itself. But sometimes it appears that the Court does not want to be bothered to do the hard work of showing how the standard operates in application.”).

²⁹ Blum et al., *supra* note 21, at 653 (“One problem with negotiating the clearly-established-law terrain is that the Supreme Court, in earlier cases, sent mixed signals as to what is sufficient to give officials notice that certain conduct is unconstitutional.”).

³⁰ See *infra* Part II.A.

³¹ See *infra* Part II.B.

qualified immunity doctrine without requiring any change in precedent and details where along this spectrum different courts have deemed policies to apply.

A. The Supreme Court's Conflicting Guidance

The Supreme Court has never conclusively defined what sources of law can be considered as clearly established law under the second prong of the qualified immunity test.³² Despite the lack of clarity, it is generally accepted that Supreme Court precedent and binding in-circuit precedent constitute clearly established law.³³ But the Supreme Court's commentary on whether non-case-law sources—namely, departmental policies—can be considered clearly established law is sparse and conflicting.

1. The Court's repudiation of policies: *Davis v. Scherer*.

The first time the Supreme Court directly addressed the use of policies in the context of qualified immunity, it rejected their inclusion in clearly established law. In *Davis v. Scherer*,³⁴ a state highway patrol employee, Gregory Scherer, applied for permission from his employer to work part-time for the sheriff's office, pursuant to a state order that patrol members seeking outside employment obtain approval from the department in order to avoid conflicts of interest.³⁵ Scherer's supervisors found that the part-time work created a conflict of interest, and after Scherer refused to quit his part-time job, his employment with the highway patrol was terminated.³⁶ Scherer sued, alleging his former employer had violated the Due Process Clause of the Fourteenth Amendment by terminating his employment without a formal pre-termination or post-termination hearing.³⁷

The district court found in favor of Scherer on the issue of qualified immunity based on the employer's violation of its own policies. Scherer's supervisors "followed procedures contrary to the department's rules and regulations" when they terminated his employment.³⁸ According to the district court, this violation of the regulations signaled that Scherer's termination was unreasonable: "if an official violates his agency's explicit regulations, which have the force of state law, [that] is evidence that his conduct is unreasonable."³⁹ Therefore, the officials who terminated Scherer's employment were "not entitled to qualified immunity

³² For example, some Supreme Court cases contain language that calls into question whether circuit court precedent even counts as clearly established law for the purpose of qualified immunity. *See, e.g.*, *Carroll v. Carman*, 574 U.S. 13, 17 (2014) ("Assuming for the sake of argument that a controlling circuit precedent could constitute clearly established federal law in these circumstances . . ."); *Reichle v. Howards*, 566 U.S. 658, 665–66 (2012) ("Assuming arguendo that controlling Court of Appeals' authority could be a dispositive source of clearly established law in the circumstances of this case . . .").

³³ *See, e.g.*, *Okin v. Vill. of Cornwall-on-Hudson Police Dep't*, 577 F.3d 415, 433 (2d Cir. 2009) ("We look to Supreme Court and Second Circuit precedent existing at the time of the alleged violation to determine whether the conduct violated a clearly established right."); *Wilson v. Layne*, 526 U.S. 603, 617 (1999) (stating that "cases of controlling authority in [the petitioners'] jurisdiction at the time" in question can "clearly establish[] the rule").

³⁴ 468 U.S. 183 (1984).

³⁵ *Id.* at 185.

³⁶ *Id.* at 185–86.

³⁷ *Id.* at 187.

³⁸ *Id.* at 188–89 (quoting *Scherer v. Davis*, 543 F. Supp. 4, 20 (N.D. Fla. 1981) (explaining that "the personnel regulations of the Florida Highway Patrol clearly required 'a complete investigation for the charge and an opportunity [for the employee] to respond in writing'" (alterations in original)).

³⁹ *Davis*, 468 U.S. at 188 (alteration in original) (quoting *Scherer*, 543 F. Supp. at 19). The regulation at issue here was adopted by the Department of Highway Safety and Motor Vehicles and signed by its Executive Director, which gave the policy the force of state law. *Scherer*, 543 F. Supp. at 7–8, 19. While in this case, the regulation conferred obligations on officials, this Comment applies more broadly and includes informal policies that do not create any binding obligations on officials who are subject to them.